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CASE NO.: 2001-ERA-0003

FILE NO.: 5-1260-010220632

In The Matter Of:

MICHAEL McNEILL
Complainant

v.

CRANE NUCLEAR, INC.
AND LIBERTY TECHNOLOGIES, INC.
Respondents

APPEARANCES:

John T. Burhans, Esq.
For the Complainant

Marty Denis, Esq.
For the Respondents

BEFORE: DAVID W. DI NARDI
District Chief Judge

RECOMMENDED DECISION AND ORDER

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This proceeding arises under the Energy Reorganization Act ("ERA" herein), 42 U.S.C. §5851, the implementing regulations promulgated thereunder at 29 C.F.R. Part 24 and our Rules of Practice codified at 29 C.F.R. Part 18. The ERA, **inter alia**, granted protection to employees in the nuclear power industry from employment discrimination resulting from commencing, testifying or other actions to carry out the purposes of the ERA or the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2011, **et seq.**

Michael McNeill ("Complainant") filed an employment discrimination complaint under the ERA on December 5, 2000. (ALJX 5) After an investigation, the Occupational Safety and Health Administration (OSHA) issued its letter of determination advising the parties that the complaint was found to have no merit (ALJX 1) Complainant on November 22, 2000 (ALJ EX 1) timely filed an appeal and requested a hearing before the Office of Administrative Law Judges. (ALJX 2) OSHA referred the complaint to the Office of Administrative Law Judges on November 22, 2000 and the matter was assigned to this Administrative Law Judge on De4cembwer 6, 2000. Pursuant to a Notice of Hearing and Pre-Hearing Order issued on December 6, 2000 (ALJX 6), formal hearings were held in Benton Harbor, Michigan, during which the parties were afforded the opportunity to present testimonial and document evidence. The parties filed post-hearing briefs, as well as reply briefs, and the record was closed on August 13, 2001. The matter is now ready for resolution.

I have thoroughly considered the totality of this closed record, and all evidence has been reviewed and I will highlight parts of the record. At the outset I note that Complainant testified most credibly before me and this Administrative Law Judge, effectuating the purposes of the ERA, has given greater weight to the evidence provided by the Complainant as that evidence far outweighs that offered by the Respondents. The following references shall be used herein: T for the official hearing transcript, ALJX for an exhibit offered by this Administrative Law Judge, CX for an exhibit offered by the Complainant, JX for a joint exhibit and RX for an exhibit offered by the Respondents.

A. CONCLUSIONS

Complainant was terminated on February 10, 1999 by the Respondents after he and a co-worker refused to perform work on a sump pump in the containment unit at the D.C. Cook Nuclear Plant in Bridgman, Michigan. Complainant had been hired by Liberty Technologies, Inc. (later purchased by Crane Nuclear, Inc.) as a mechanical technician for the maintenance and repair of systems at the Cook Plant. The Respondent companies were subcontractors working at the nuclear plant after it went off line in September, 1997 for substantial work and repairs mandated by the Nuclear Regulatory Commission. Management had to bring the Plant into compliance within its directives. (T 130-131)

Virtually all systems that needed maintenance or repair must be done through a "work package" which in turn requires detailed documentation and verification of all steps of the work to be performed in sequence. The work in this case was the changing of grease in the coupling of an important sump pump in the containment unit of the plant. Because of Complainant's strong objection to working a defective work package, and his prior refusals to falsify documents at the request of his immediate supervisors, the Complainant was terminated from employment in violation of Section 211 of the Energy Reorganization Act (ERA). As a direct result of his termination, Complainant was denied his unescorted access at the nuclear plant which not only had an effect on his employment at Cook, but at other nuclear plants throughout the country. Despite his attempts to mitigate, Complainant has suffered substantial damages and emotional distress, and the relief ordered herein shall be discussed below.

B. SUMMARY OF THE EVIDENCE

1. Background

On April 6, 1998, Liberty Technologies, Inc. hired the Complainant as a mechanical technician and pump mechanic to perform work under Liberty's contract for maintenance and repair of mechanical systems at the Cook Plant. (T 128-129) Liberty was eventually purchased by Crane Nuclear, Inc., in a stock merger in October, 1998. (T 133) The Cook Plant is owned and licensed by American Electric Power Company based in Columbus,

Ohio. Complainant worked on a pump crew with other technicians. He has over thirty (30) years experience working at various fossil and nuclear power plants, steel mills and construction sites. (CX 22)

As at other nuclear sites, Complainant received his work assignments from his supervisor in the form of detailed step-by-step work packages for the repair of various pumps and valves. The supervisor received the packages from the utility planners, who are employees of the utility contracting for the service. Upon receipt of a work package, Complainant and a co-worker do a walk-down of the work. A walk-down is literally walking down to where the pump or operating system is located to inspect the device to be maintained or repaired. The Complainant, in walking down the system, carefully reviews the step procedure along with the co-worker involved plus the supervisor. (T 137, 150) If a step in the procedure is omitted, it is the responsibility of the technician to alert his supervisor in the planning department of the plant to correct the omission or defect. (T 138)

The plant at Cook had been shut down by the NRC since September, 1997. Management had to bring the plant into compliance with the directives of the NRC. (T 130-131)

Complainant was assigned to a pump crew with Paul Pappalardo and a helper. Their immediate supervisor was Tom Brown; the onsite project manager was Woodrow Hall. (T129-130)

2. Respondents Requested That Complainant, Paul Pappalardo, And Others Falsify Documents.

During his employment at Cook, Complainant encountered problems with work packages from time to time. “They were impossible to work. You couldn’t follow them and do the job.” T 169. Specifically, the defective packages included condensate booster pumps, heat and drain pumps, and systems for the turbine lube oil. Work packages, or Job Order Activities, were usually step-wise tasks that had to be followed as written. They covered almost all aspects of repair and maintenance at Cook.

The condensate booster pump is a centrifugal pump that takes the suction off the hot water pumps and discharges them to the suction of the feed water pumps, which feed the steam generators. Tom Brown asked the Complainant to rewrite the

summary comments sheets on the work package. Complainant refused because he was on vacation part of the time that work had been done on the package. According to the Complainant, that would be falsifying a nuclear document and he would not do it. (T 174-175)

Complainant had another objection to a particular package in which Woody Hall wanted him to delete a comment from the summary comment sheet that he had written. Complainant refused to remove the comment. This occurred approximately four months after Complainant arrived in April of 1998. (T 202-203) "Because of certain training that I have received regarding nuclear regulatory regulations I am hesitant to do anything to any package that is not strictly above-board and honest." (T 204)

In another instance, Complainant and Pappalardo were working on a pump where they were unable to achieve a proper alignment. Pappalardo was doing the summary comment sheets and wanted to write a Condition Report on the pump and motor. However, his supervisor, Tom Brown, would not let him do it. (T 205) Six months later, someone else tried to perform the same job, wrote a condition report, which resulted in a stoppage of work to resolve the issue. (T 205) A condition report is written to inform management that there is a discrepancy or deficiency in a component or system in the plant. (T 205) Because they were not allowed to write certain condition reports, they were not allowed to do their job properly. The Complainant testified that condition reports were routinely discouraged by Woody Hall and Tom Brown. (T 206)

In another work package, Complainant was to change half inch valves in the demineralizer area . Complainant, having worked in those areas before, was concerned about caustic substances such as sulphuric acid that sprayed in his face. Since that time, Complainant always had a water hose next to him in the event he had to wash out his eyes. (T 207) Because he was unaware of the hazards that he was facing, he was concerned about whether he had a safe work area. (T 208) Because it took so long to determine that the area was safe, Complainant went to Tom Brown and Woody Hall and asked them if he could call American Electric Power Operations and establish where the valves were in the area to protect himself. (T 209) A number of valves and pumps were "red tagged" but some were not. A red tag means a component has had its electricity cut off so it can be worked on. In other words, anybody could have hit a switch

and the pumps would have started, pushing water into Complainant's face. (T 209)

Because of the potential for danger, Complainant called Woody Hall and asked permission to write a Condition Report to make a change and incorporate new piping to mitigate any danger. Hall stated to Complainant that he was going to handle the situation within Operations. Complainant was taken off the job and assigned elsewhere. (T 210) Later, the other valves were red tagged and de-energized so that workers could work in the area. (T 211)

Another dispute with a condition report with Woody Hall involved six heater drain pumps and six condensate booster pumps. The reason for the condition report was that the section lines for the pumps were only 3/8 inch diameter instead of ½ inch. Complainant was concerned that the pumps would not be lubricated sufficiently because of the small diameter of the pipe that supplies the lubricating oil. As a result, the bearings of the pumps could be starved of oil and fail. (T 212-213) Complainant had written a condition report before and nothing happened. The problem was never resolved. (T 213) Woody Hall's reaction was that he was too busy to deal with the condition reports. Hall accused Complainant of being a would-be engineer and there was a lot of work to be done and he did not understand it. Complainant believed that it was a simple adjustment that had to be done and would not take a large amount of time if quality control verified his position. (T 217) All of it could have been done in one shift. (T 218)

On another condition report, Complainant and Jim Curtis worked a pump that was pumping only about ten (10) or twenty (20) percent of what specifications called for. Curtis was a coworker on the pump crew working for Respondents. (T 218-219) The pump was slowing down because the impeller was clogged with plastic. An impeller is similar to a propeller in that it pulls fluid in and pushes it out. Because of the debris, the impeller could not pull the water in and the pump did not work properly. (T 219)

Complainant testified that the AEP plant management, because of its desire to get back on line and produce electricity, wanted to correct any and all deficiencies to satisfy the NRC. One means of doing that was to encourage the writing of condition reports by anyone who noticed a defect in the plant. (T 220)

Only one condition report that Complainant wrote was actually processed by Woody Hall to the licensee, AEP. Tom Brown showed Complainant that the condition report had actually gone through and that someone had taken note that a correction needed to be made. (T 221)

Generally, Respondents' management discouraged the writing of any condition reports. "Tom Brown did not want to take any CR's." Woody Hall did not encourage them. (T 22) Complainant, with the one exception noted above, did not get any response to the condition reports that he had filed pertaining to pumps and other systems.

On the Monday before Complainant and Pappalardo were terminated, there was a meeting in Tom Brown's office. Tom Brown told them that they were not allowed to go to AEP Planning to have a package corrected anymore. They had done that prior to the meeting. (T 222-223) Complainant and Pappalardo told Brown that if they could not go to planning, then "don't give us any more defective work packages. Because we would always take them to planning to get them corrected. And I also told Tom at that time we were going to have to do something about this CR business, and if I gave him a CR I wanted it to go straight to operations or wherever it was supposed to go. I didn't want it tied up down with Woody." (T 223) Complainant testified that if he had been permitted to go to the Planning Department of AEP, it could have been fixed in thirty (30) minutes. (T 234)

Tom Brown had a phrase that stuck in Complainant's mind. When Brown asked Complainant to write up the work packages and Complainant refused to comply with improper practices, Brown would say "McNeill won't lie, I'll have to get someone else to do this." Brown repeated this "a couple, three times. You know, it was not a single incident." (T 223-224) Complainant made it clear to Brown that he was not going to make any entries in nuclear documents that he felt were suspect. Complainant's understanding regarding nuclear power plants was that he was not allowed to intentionally falsify a document at a nuclear power facility. (T 233)

Hall admitted the allegation in CX 13 that he had not processed the condition report that had been generated thirty (30) days before. (T 1003) Hall denied that it was AEP policy that any Liberty employee could generate a condition report and submit it directly to AEP management, even though it was so stated on page 2 of CX 13. (T 1005-1006) Hall testified that

RX 20 and RX 53 at Sec. 5.3.2 gave the supervisor authority to clarify orally any problem in a procedure. (T 1026) RX 22 is entitled "Job Order Sequence." Hall admitted that Exhibit 22 addresses nothing about omission or addition of steps to used on a work package. "Correct. It's just about sequence." (T 1026) Hall further admitted that the issues of adding or omitting steps from a work package are not in RX 21, RX 22, or RX 20:

> Q. And so, if you have an issue pertaining to the addition of a step that someone feels ought to be there, 21, 22 and 20 really have nothing to do with that, just the sequence. Correct?
>
> A. 20 has to do with the description within the sequence text. You are correct. I do not, I can, in this work order, this work activity, step 2, I can verbally clarify step 2. I am not adding or deleting another sequence, sir.
>
> (T 1027)

Hall conceded that neither Complainant nor Pappalardo wanted to change the sequence. They wanted to add a step. Although Hall determined that no additional step was needed, he admitted that if it was determined that an additional step was needed then one would go to planning and get the additional step authorized because there was no oral authorization to add a step, just change the job order sequence. (T 1027)

RX 53 was tendered by the Respondents as authorization for an oral modification of job order sequences. In fact, the document on its face has nothing to do with job order activity or job order sequence. The fact that Hall testified he relied on it (T 1032) is of no moment if it only applies to plant management instructions (PMI's). Job order sequence and job order activity are terms of art that have been used in the context of the litigation. The absence of any reference to those terms negates any relationship between RX 53 and CX 10, and I so find and conclude.

Under page 1 of 9 in RX 53, the "background" material refers to procedures for information management, document control, maintenance policy, information control policy and the like. It does not purport to refer to job order activities on individual systems and components within the nuclear plant. For that reason, Complainant submits that Section 5.3.2 therein bears no relevance to CX 10, RX 21 or RX 22. Because of the importance

of CX 13, this Court vacated its ruling admitting that document as a limited exhibit. (T 1036) In the Court's opinion, CX 13 and RX 13 are the most important documents in the case. T 1036. The Court then admitted the document CX 13 without restrictions as a full exhibit. RX 13 was withdrawn by Respondents. Complainant moved for its admission by adopting it as his own exhibit; however, the Court rejected the exhibit at that time. Complainant now asks the Court to reconsider that ruling that it made at T 1038-1039 for the reason that it was not only marked as an exhibit by Respondent, but used at length in examining Respondents' own witness Marcus Boggs.[1]

Complainant testified that in the writing of his condition reports as well as his refusal to work the packages that were defective, he was acting in good faith. He understood that the NRC had shut down Cook for a number of reasons. Cook's procedures were among the worst he had ever seen. Complainant would start out with a procedure such as CX 10 and by the time he got half way through the project, there would be amendments that would be "one inch thick to cover all the rescopes and corrections that have to be done to that package. Sometimes, we would take packages back twice a day to get things rescoped on them." (T 1045) When he and others were prevented from going to the Planning Department, it tied his hands in terms of fixing things. (T 1046)

3. Complainant and Pappalardo Refused to Run A Defective Work Package on a Sump Pump on February 10, 1999.

On January 24, 1999, AEP Maintenance Manager John Boesch met with Woody Hall, Complainant and others telling them that the plant wanted to do things by the book. Boesch stated that the company encouraged condition reports. The reaction of Complainant and Pappalardo was one of delight as they would have no more problems over the packages that they were assigned. (T

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[1]I agree with the Complainant on RX 13 as that exhibit was identified pre-hearing as a proposed exhibit and while Respondents, for their own reasons, had moved to withdraw that exhibit, Complainant has moved for leave of Court to adopt that exhibit as his own. This Administrative Law Judge, having reconsidered his prior ruling, now admits into evidence that exhibit as CX 13a as it is relevant and material to the issues presented herein. In this regard, **see Seater v. Southern California Edison**, ARB Case. No. 95-ERA-13 (September 27, 1996).

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On February 10, 1999, Complainant started at 6:00 or 7:00 a.m. They received CX 10 at approximately 9:30 a.m. when he reviewed it with Pappalardo. They had no other work package assigned for that date. When they first received the package to review, Tom Brown and Pappalardo told Complainant that they were going to walk down the clearance to check out the red tags described on page CR 0028 of CX 10. (T 235) On review of CX 10, the first thing that Complainant noticed was that it was a step-wise procedure on CR 0032. Because he had to follow the step-wise procedure to the letter according to his training, he stopped work when he noticed there were no steps about cleaning up the couplings and greasing the bearing. (T 237)

The step procedure should have told them to take the coupling apart, clean it and then handpack it. Looking at the package, they wanted to get it rescoped, which they had done dozens of times with other packages. (T 238) Finally, there was no description regarding the confined space in which they would have to work. Normally a package states what kind of atmosphere to monitor for such as a gaseous or explosive atmosphere or an oxygen deficiency. (T 239) The confined space in question was a sump pump located in the annulus tunnel in containment. (T 240; CX 2) Pappalardo had his own concern about how much grease to put in the coupling, a concern Complainant agreed was valid. (T 241)

Complainant testified that the packages given to him and his coworkers at Cook were “terrible” compared with packages at other nuclear plants. (T 241)

After making the determination that they could not work the package, they noticed a coworker, Ricky Richardson, who stated he had looked at the package and okayed it . Complainant asked how he could miss this. Richardson then stated “how did I miss that.” (T 242)

Tom Brown came out of the Respondents’ trailer. Complainant and Pappalardo told Brown that they could not work the package because it needed to be corrected. Tom Brown went into the trailer to talk to Woody Hall, who told Tom Brown to tell them that they could do it using “skill of craft.” Complainant testified:

> And both Paul and I were flabbergasted because I don't care how many witnesses have said in here, I have never heard that term in my life. In the packages we got they said use good mechanical work practices. And this was foreign to me. I guess in some plants they use it a lot, but it was certainly foreign to me.
>
> And we told him that we couldn't do it. We had a step-wise procedure. We have to follow the procedure. I think the man [Molden] testified yesterday you have to follow the procedure if it's step-wise. See there's a difference between a procedure that is stamped job order sequence.

After Tom Brown made his comments, Pappalardo said he was going to go in to talk to Woody. At that time Brown and Pappalardo entered the trailer and Complainant remained outside. (T 245-246) The next thing that Complainant saw was Pappalardo coming out of the trailer waving his arms stating "Woody just fired us." Both he and Complainant were incredulous. Pappalardo then stated that he was going to go back in and ask him again. Complainant heard Pappalardo ask Woody if they were fired. Complainant listened for a no and did not hear no; he heard an affirmative response. (T 246) Instead Woody stated that he and Pappalardo had to leave the plant and that they were out of there. They then went to the NRC offices. (T 247) Upon arriving at the NRC offices onsite, Pappalardo talked to an NRC rep in Illinois. The NRC site reps then called AEP Maintenance Manager John Boesch. Boesch came up to the NRC offices with a copy of CX 10 in hand. (T 248-249)

Boesch told Complainant and Pappalardo that he did not understand how this could happen in that they did exactly what they were told (referring to their prior meeting) and should have done. He also stated that he had just found out that they had been fired. (T 250)

Because they were fired, Complainant and Pappalardo had to be escorted while in the protected area of the plant, which is that section beyond the fence where the reactors and equipment are located. They agreed to talk to AEP Employee Concerns about what happened. Complainant received a card from Boesch. (T 251) Without the badge or the security clearance that goes with it, neither Complainant not Pappalardo could be inside the plant without an escort. In order to have a badge, it is necessary to have a job. (T 254-255)

Complainant and his coworker were escorted inside the protected area in the lunchroom from the time they left the NRC offices until around 12:30 p.m. (T 257-258) They could not go to the bathroom without being escorted. (T 258)

During the two-hour period that they were waiting, they heard nothing from Crane about their jobs. They heard nothing about their unescorted access being restored either from the plant or Respondents. (T 258)

Around noon, Robert Reynolds and other coworkers on the pump crew came out of the lunch room. Reynolds stated to Complainant that "we refused to work the package and we weren't fired." Reynolds stated that "they told us that we had to work the package and we told them we weren't going to work it and they didn't fire us." (T 258-259) Later on Jason Delashmette told Complainant that Tom Brown had directed him to work the sump pump package as written or be fired too. (T 267) Complainant, at that point, wondered why someone did not come down to tell him and Pappalardo to go back to work. Complainant stated that he waited long enough and was ready to get out of there. He also relayed information about the other members of the pump crew who would not work the package and nothing happened to them. (T 259)

Complainant and Pappalardo continued to wait until such time as the security guard escorted them to an office where the guard made a phone call to Employee Concerns. Security ordered them to give him their badges, which they did, and he turned them in. Security then escorted both out to the gate where they no longer needed unescorted access. (T 259-260) They walked their way down to Employee Concerns, outside the protected area, where they spoke to Jim Labis. While they waited in the Employee Concerns trailer, Marcus Boggs, Field Service Manager of Respondents, phoned in and requested to speak with Complainant. Boggs wanted to talk to Complainant personally as soon as he could get to the plant from California. Boggs asked Complainant to stick around the area and not leave town. Complainant agreed. T 262. Boggs mentioned nothing about the Complainant's job in that conversation. Complainant strongly disputed any statement by Boggs that he still had a job or that he was going to be paid all of his money during the investigation. (T 262-263)

Molden emphasized that work packages must be done correctly whether the plant is in a outage or shut-down phase or not. (T

73) Even simple procedures require following a work package. "You can either follow it or get it changed." (T 75)

CX 10 is a step-wise job order. Although there is latitude to adjust the order of the steps, the worker must not omit or contradict steps without supervisory involvement, usually from American Electric Power itself. (T 78-79) If a worker believes there is an omission, "he is to discuss that with his supervisor and discuss whether additional details need to be added or not." (T 79)

No matter how great the skill of the worker assigned to a package, he or she is still required to follow the step-wise procedure. "Skill of craft" is a term of art that refers to the level of detail that the *planners* use to draft the job orders. (T 81-82) Woody Hall testified that skill of craft is used by the planner to draft work step in a step-wise procedure. (T 799-780) It is how the work procedures get developed. The reason that work packages with step-wise procedures are needed in the nuclear plant is to provide consistency in the work, direction to the workers, and information to operations to remove equipment from service and for repair. (T 83)

With respect to CX 10, Molden testified that in some instances all that a work package may need is a verbal clarification to rectify a problem. (T 97) He also testified that the work package could be revised in the future to provide consistency for future work on the pump. (T 102) Molden conceded that there was no basis for a first line supervisor to make an oral modification in RX 22 pertaining to job order sequences. If the job order sequence was unacceptable, the supervisor "shall rescope the job order activity via either a ' pen and ink' change to the hard copy or by returning the package to planning." (RX 22 at ¶ 7) Molden testified that it is a judgment call whether a supervisor can clarify a job order activity by talking about it or by actually writing in another step. (T 107) He also testified that additional steps could be added to a procedure by a pen and ink change, sending it back to planning, or an oral clarification by the supervisor. Molden stated, "after all the discussion, maybe the supervisor feels like it would be value added, the worker feels like it would be value added. And the time it takes to add the steps is less time than that ensues, sometimes." (T 109) Further, if the instructions that the worker wanted to add into CX 10 were done, the repeatability issue would be eliminated. In other words, no

more oral clarification for future workers would be needed. (T 109, T 110)

On the work package for the sump pump in question, Pappalardo was the lead man to whom Complainant would go if he had a problem with a work package. (T 156) If Complainant found the package in order, he would sign his name on page 0024 where his name is printed. Complainant neither signed nor initialed CX 10 anywhere. (T 157-158)

Complainant denied that an oral instruction from Woody Hall to fill in the gaps in CX 10 would be sufficient to comply with Respondent's procedure and rules. (T 278)

On cross examination, Complainant testified that there were directions missing from the step wise procedure that he believed had to be in there for him to work it. Those included taking the coupling apart, removing old grease, inspecting the coupling. (T 617)

Complainant denied the suggestion by Respondents' counsel that he wanted to a clarification of CX 10. Instead,

> A. What is accurate is that we wanted this procedure rescoped to reflect what we should be doing to that pump because it is a step-wise procedure, a; b, we cannot violate it in any manner. You see, when I'm looking at this procedure, I know it's wrong. And if I go ahead and I do something, I am woefully and intentionally disregarding what I'm taught to do. (T 644-645)

Further, Complainant testified that the Summary Comments Sheet do not have the purpose of making corrections on an otherwise defective package. It simply means that every step that is performed must be detailed on the Summary Sheet. "The Summary Comment Sheet is in no way, to my knowledge, ever used to correct a procedure. We use a CR. If you can't get planning, if somebody, I never had this happen but say people bumped heads, then you would write a CR up. But I never had anybody say to violate a step-wise procedure." (T 645-646)

Complainant properly rejected Respondents' counsel's comparison between fixing a tie rod on a car and working on a sump pump in a containment building of a nuclear plant. Complainant's response:

> A. No, it's terrible. I am, I am upset that I have to have people say, couldn't you do this? Couldn't you do that? Couldn't you do anything? I says, could I? Yes. Am I bound my responsibilities as a nuclear worker to say no, the answer is, yes. We don't have lawyers working in Containment. We have RP people and engineers that tell us what to do. And we don't have cars or lawn mowers in there. We have things that are important to the operation of a nuclear power plant. (T 646)

When Tom Brown conveyed to Complainant on February 10 that he should use "skill of craft" instead of rewriting or adding to the procedure, there was no detail conveyed by either Tom Brown or by Woody Hall through Tom Brown. (T 653-654)

Boggs testified that the February 10 work package was amended with additional clarifications and reissues. (T 787) Hall admitted that Brown told him on February 9 in the morning that Pappalardo "wanted to add in the extra steps in the JOA to uncouple, clean and inspect the coupling." (T 900) Pappalardo wanted to take the package back to planning and have the planner rewrite the steps to include the steps of uncoupling, cleaning the grease out and inspecting the coupling. (T 901) Hall testified that his subordinates were not to go straight to the planners, but to their supervisor, who would review the problems. The workers could not go straight to planning; they had to go through the contracted supervisor first. (T 902)

CX 13, on the other hand, provided a direct pipeline to AEP personnel by any contractor employee. In that event, Hall testified that the "first line supervisor designated as lead" was Paul Pappalardo. (T 907) Pappalardo, having determined that there are omissions, wanted the matter to go to planning to be rescoped. (T 907) Hall testified that he felt McNeill's objection to the work package in CX 10 was a carryover of the attitude from the morning meeting about the micrometer and dial indicator. (T 918) However, he had no explanation as to why Pappalardo, who did not have such an attitude, took the lead in objecting to the work package in CX 10. Hall was adamant in testifying that the work instructions were adequate with verbal guidance notwithstanding the objections above from Pappalardo and McNeill. (T 919) Although Hall testified that refusing to send it to planning was consistent with Cook procedures, CX 13 from Marcus Boggs contradicts that, and I so find and conclude. (T 920)

With respect to the early morning meeting on February 10, Hall admitted that he was heated in his discussions about the missing piece of equipment. (T 922) In his deposition, Hall testified that he only meant to send Complainant and Pappalardo home and not fire them until a "determination" could be made. The following questions were then asked:

> Q. Determination as to what?
>
> A. As to what? As to the disposition of the individuals for the belligerent attitude from the one individual.
>
> Q. Okay. And but only as to that individual McNeill; is that correct?
>
> A. As far as his belligerent attitude, yes.
>
> Q. Was there going to be a disposition as to Mr. Pappalardo?
>
> A. Yes.
>
> Q. For what?
>
> A. I felt he needed more schooling on procedures and skill of craft; but, of course, that would only be my recommendation to Mr. Boggs and Mr. Burkey.
>
> Q. Were you recommending -- were you going to recommend to Mr. Boggs any form of discipline to McNeill or Pappalardo?
>
> A. Not unless it was asked. (CX 32 at 39-40) (Emphasis added)

Hall had testified earlier that both Complainant and Pappalardo had a motive for causing trouble with the work package because of their "belligerent" attitude that they had regarding the early morning meeting and the micrometer. Based upon the deposition of Hall, however, only McNeill was belligerent.

At the end of the discussion, Hall admitted that "I had a burr in my saddle, about 6 of them, sir." Also, he testified that "I'm very, very upset with these individuals that they would pay such a light response to this." (T 923) Hall

testified that he never cooled down after the meeting at the time he received the work package. (T 923) Hall was insistent that the work instructions could be handled as written "with some verbal skill of craft clarifications." (T 924) Hall further testified that Complainant and Pappalardo were upset because they could not go to planning on their own in the morning meeting. Hall was upset because they "can't follow simple instructions and I feel that what I did after that was justifiable." (T 925) At the end of the discussion as reviewed by Mr. Hall, he testified that Complainant and Pappalardo were to be ordered by Tom Brown (1) not to go to planning and (2) to accept his verbal guidance and not request any written change of procedure pursuant to his concept of skill of craft. (T 927) "They should be able to do the job, there's no problems." (T 927) (Hall testimony)

Brown came back and told Hall that Complainant and Pappalardo refused to do the package as he instructed. Complainant and Pappalardo still wanted to take it to planning. (T 928)

Hall described his relationship with Pappalardo as being very friendly. In fact, he called him "Pappy." Hall testified:

> I asked Pappy, I referred to him as Pappy because I've known him a long time. I said, Pappy, why can't you do the job? You've tried to do it before, why can't you do the job? He told me I need these instructions. I want instructions of (sic) uncouple, clean and inspect.
>
> I told Pappy he's been a pump mechanic for 37 years and I consider that part of his skill of craft. He knows how to do that step. It's implied. Go down and do the job. And he refused to go do the job. When he refused to do the job, from reviewing the package and all the other things not being done, I told him, look, just get ready, I want you to go home. Go, go, I'll take you to the gate, go home.
>
> In other words, there's no sense having this individual even try to do the job if he can't do what was instructed to start out with. (T 930)

Hall was familiar with Pappalardo from prior work and also knew his wife. (T 969-971) Woody Hall considered himself a friend

of Pappalardo. (T 972) Hall never talked to Complainant about refusal to work the package. (T 931)

4. Complainant Engaged In Activity Related To Nuclear Safety.

James Molden, the Maintenance Director at the Cook Nuclear Plant, was familiar with systems and components within the Containment Building and the Auxiliary Building. (T 54-55) Before Cook, he worked at Diablo Canyon Nuclear Plant, which he described as very similar to the Cook Plant. (T 55-56) He described CX 1 and 2 as the verbal and schematic descriptions of the Station Drainage System in the Cook Containment Building. These documents talk about collection of drainage and how it is sent through pumps for discharge. (T 59-60)

The function of the Station Drainage System is to collect liquids from the floors, equipment, and ice condenser to convey to the waste disposal system. (T 63; CX 1) The sumps, including the one on which Complainant refused to work, collect radioactive and non-radioactive waste. (T 60) The sumps reduce possible contamination of the containment "due to any radioactivity of these waste liquids by providing a systematic means of transmitting these liquids to the waste disposal system." (T 64; CX 1 at item 1)

The waste liquids go to a "dirty waste holdup tank," defined as a tank that "collects liquids that are both radioactive and non-radioactive." (T 66) The clean waste holdup tank "collects clean and radioactive liquid." Sometimes a clean tank is more radioactive than the dirty tank. (T 66) According to Molden, liquids from the reactor cooling drain tank are "fairly radioactive water" and run directly into the pipe tunnel annulus sump by gravity. (T 67-68; CX 1 at Section 6.6)

In a loss of coolant accident, the reactor fluid and borated water are "dumped" into the containment building to cool the reactor unit. A cleanup effort would require that the pipe tunnel sump be drained. (T 68-69) The sump pump motor in questions would be used to clean or drain the sump of the fluids. The flow rate for the pump is 50 gallons per minute. (T 70; Exhibit 1 at 9) The auxiliary building is where the waste accumulates and is processed. For example, the dirty holdup tank water is cleaned by demineralizers and discharged

into Lake Michigan when clean. (T 71) The discharge requirements are “very strict.” (T 72) The containment building gives the most exposure to an individual in terms of radioactivity. (T 72)

The term “safety-related” is also a term of art that has three definitions according to, among other regulations, 10 CFR 10.49:

> (1) It refers to the pressure boundary integrity of the reactor coolant in the piping to and from the steam generator;
>
> (2) It is the ability to shut down the nuclear reactor and maintain it in a safe shutdown mode in case of an accident;
>
> (3) It refers to mitigation of certain consequences of accidents that would result in off-site radiological consequences. (T 85)

Not every consequence in a nuclear power plant, however, fits within the regulatory definition of “safety-related.” For example, undue exposure to radiation is a safety issue that, although rare, would not necessarily fall within the formal definition of “safety-related.” (T 87-89) Also, because the pipe tunnel sump pump is isolated in an accident, it does not relate to the three definitions of “safety-related” that are listed on Exhibit 10. (T 90)

Molden testified that if a sump pump motor or coupling is not adequately greased or inspected, it would severely reduce its service life and would show up as a re-worked component in the not too distant future. “...It would probably fail relatively soon or cause us to have coupling damage...” (T 112-113)

The Complainant defined “safety-related based upon his experience in the nuclear industry. Safety-related “is equipment that is in place to prevent a nuclear accident...” He testified that unsafe conditions can exist in a nuclear power plant that do not fall within the regulatory definition of “safety-related.” For example, if steam generators have a leak in containment, such problem would require proper dress and protective clothing to work on the turbines. (T 328-329)

Respondents made the following admission in its answer to the Complaint to United States District Court lawsuit attached as CX 26 in Paragraph 21E. The Respondents admitted that "adhering to the procedures is mandatory and a prerequisite to the safe operation of a nuclear power plant."

Falsification of documents, (for example, putting comments on the summary comment sheets for work not done by the nuclear worker) is a safety issue, according to Complainant. If workers verify tasks that they did not do, it can affect any component of the plant from a bearing to the control rod drives in the nuclear reactor. (T 635) In the case of the sump pump in CX 10, if there were a failure of the grease or a failure of the coupling because it was not inspected, it could harm the system or component. As Complainant testified:

> But realistically, if this sump pump failed and there was enough fluid going into the sump, the sump would overflow. And contaminated water would go wherever it chose to go under the influence of gravity. If it would have flooded anything else, like a panel or something, I can't say. But whatever that water could reach, that would limit the damage. You know whatever it can get to, that's what it's going to contaminate. And it may be an electrical plug in. Whatever it reaches, that's what it will hurt. (T 636)

In another scenario, because the reactor coolant drain tank was adjacent to the sump pump, it drains by gravity. Complainant is experienced in working reactor coolant pumps. The fluid is dangerous. In one instance at Palo Verdi, radiation protection believed that he might have a dose rate of 40 rem per hour which, if one is exposed to it for 8 minutes, one would get the dose that the NRC allows workers to get in one year. "40 rem per hour is a lot." (T 636-637) Both Palo Verdi and the Cook Plant have pressurized water reactors. There would be no material difference between the reactor coolant fluid in either nuclear site. (T 637) Complainant testified that he "would not want one drop of it on my body. I know that. But it would be diluted if it was put into, you know, a small amount of discharge into a large sump and dilute it. But it would still be highly contaminated." (T 638)

Complainant reemphasized that "safety related" as that term is used in the nuclear industry refers to the reactor core, the coolant pumps and the pressurizer. If one walks into

containment or into the Auxiliary Building which has been contaminated with leaks, that is another issue involving safety outside the technical definition. (T 639-640) Complainant testified that "there's a lot of dangers regarding radiation and contamination that are outside of the scope of this bowl that we call safety related." (T 640) Containment sumps "are presumed to be contaminated. And if an RP [Radiation Protection Worker] walks up there, and you're, you're in there in street clothes because you don't think it's contaminated, you're out of the plant. You just have to assume that these things are contaminated." (T 643)

In the sump pump work package in CX 10, it required the worker to go into a contaminated area that required protective clothing such as protective coveralls, hood, rubber gloves and rubber shoes. Complainant testified that sumps are designed to collect any fluid in a containment building that escapes a component or piece of piping. (T 336-337) Work on the sump pump in CX 10 could present an unsafe issue for him as follows:

> Q. What made CX 10 or the sump or the sump pump an unsafe condition even if it didn't fit within the nuclear definition of the federal regulation definition of safety related?
>
> A. If the sump pump, for example, failed, you could easily get contaminated water all over the room. Wherever, the area is around that pump. It's there to remove it. So, you want to have the pump working. You want to have it work right all the time. You want to ensure that everything on the pump works. Not just the pump but the motor, alignment. You would want to make sure that, that was correct. You ought to turn things to make sure that your bearings were not shot or going out. Because you have two pumps. One pump is always a back up pump for the other one. One pump doesn't work, the other one takes over. Or, if there's too much fluid going in, they both run. They're there for a purpose. And that is to remove the fluid from the sump.
>
> Q. And what if the motor fails?
>
> A. If the motor fails then the pump doesn't work.
>
> Q. And, if the pump doesn't work, then what could

happen?

A. Hopefully an alarm would go off. But, if the fluids got too high, they would overflow the sump.

Q. Could those fluids be contaminated?

A. They can be highly contaminated.

Q. Would that be an unsafe nuclear condition?

A. It certainly would be to me if I had to go down there and clean it up.

Q. Would that, however, fit within the definition of "safety related"?

A. No. (T 339-340)

If one pump went defective and the other pump was not enough to handle excess fluids, "then you would have fluids coming out of the sump and contaminating whatever they touched." (T 655)

McNeill first started working in a nuclear plant in January, 1995. The difference between working in a fossil fuel plant and a nuclear plant were the procedures that had to be done in a step-wise manner and "followed to the letter." He had no procedures at a fossil unit. He testified that there was a "big difference in how you accomplish a job" between the two. (T 121) After starting work in the nuclear plants, Complainant received training on this new aspect of dealing with procedures. Although Complainant did not have to be trained with respect to pumps and valves, he was taught that "You never violate a procedure under any circumstances." (T 121)

Complainant testified that the work package for the sump pump had a box marked "Confined Space Entry", which is a safety issue in the work package. (T 150; CX 10 at 0025) CX 10 at 0030 is a page on which safety issues are to be written before any work can begin. That page was left blank. (T 150)

Craig Fritts was employed at the Cook Nuclear Plant by American Electric Power from April 12, 1999 until December 8, 2000. He was a principal engineer working in the Maintenance Group. (CX 45 at 5) He was promoted to Engineering Programs

Supervisor in which capacity he supervised preventive maintenance in maintenance rule sections at the plant. (**Id** at 7) He became familiar with preventive maintenance tasks and was familiar with a number of Exhibits admitted in the present case. (**Id** at 8-9) He determined that CX 1 and 2 were part of the original equipment that was put in when the plant was built in the mid 1970's. He was qualified to speak to the components in the station drainage system because he had worked on a waste disposal system that was similar to that. (**Id** at 9-10) He testified as a fact witness who was familiar with the systems. (**Id** at 11-12)

Fritts was familiar with the term "safety related" and its particular meaning within the nuclear industry. He defined the term as follows:

> Safety related SSC's, or systems, structures and components, are those that are required to be operable or functional following a design basis event. And the reason they need to be functional is to insure that you can safely shut down the reactor, insure the integrity of the reactor coolant system boundary, and to prevent or mitigate consequences of exposure to the public, accidents which could, you know, result in off-site exposure.

(CX 45 at 13)

He further testified that there are issues of safety concerns in a nuclear plant that happen to fall outside the regulatory definition, as follows:

> The SSC's which are called safety related, are just as such, they are defined and they meet those requirements; however, there is a large amount of equipment and systems that are still important to safety -- and that's a key term, important to safety. And, in fact, that is the premise in lots of the foundation behind the maintenance rule which is 10 CFR 50.65, the maintenance rule.
>
> Obviously within the scope of the maintenance rule is everything that's safety related, but then you also evaluate everything else that's, quote-unquote, non safety related, and you evaluate its importance to

> safety. And depending on where it falls in that evaluation of importance to safety tells whether it's included in the maintenance rule, then you treat it in a pseudo safety related fashion.
>
> Now, is that stuff that's not -- that is non safety related relied upon directly to bring the plant to a safer shut down condition, or insure the integrity of the reactor coolant system or mitigate off-site exposure? No, it's not. But it perhaps assists safety related equipment in doing it. So there is lots of equipment that is in fact risk significant or important to safety that is not necessarily safety related.

(CX 14 -15 at 11-12)

Fritts reviewed the pipe tunnel sump in CX 1 and 2. (CX 45 at 16-18) The type of material that would be drained away and collected in the sump to be pumped out is draining from the reactor coolant drain tank release. It also drains away various floor drains, condensate from overhead pipes, and drainage from the ice condenser. CX 45 at 18. The kind of fluid that collects in the pipe tunnel sump in the annulus is "contaminated water, contaminated reactive water." (CX 19) The two pumps and the sump are the ones that were identified in CX 10 PP 61A and PP 61B, the backup. (T 645 at 19-20) If any liquid collects in the sump, once it reaches a certain level, a switch will start the 61A pump to pump the fluid to the dirty waste holdup tank. The term "dirty" means contaminated radioactive water. (CX 45 at 20)

The extent of the contamination of the water that goes through the particular sump pump in CX 10 is variable from "relatively clean water to straight reactor coolant, and all liquid inside that sump is and must be treated as radioactive contaminated water." (CX 45 at 21) The destination of the fluid pumped out of the sump goes to the dirty waste holdup tank in the Auxiliary Building where the fluid decays to reduce the radioactivity. "It's then subsequently pumped from the waste holdup tank through a waste processing system, in this case it is a Duratek Waste Processing System, and then it is pumped to a monitor tank for subsequent release, after sampling, to the lake." (CX 45 at 22)

If the 61A pump failed, potential issues of nuclear safety

could be implicated. If 61A were to fail and 61B were not working properly, then nothing is being pumped out of the annulus area of the Containment Building where the reactor units are housed. If the water level got high enough in that area, it would start to affect instrumentation that is on the walls on the Containment. (CX 45 at 22) Even though the instrumentation is "environmentally qualified," that does not mean it can withstand flooding. It might be able to stand high radioactivity, temperatures, steam and moisture content, but not necessarily flooding.

If the instrumentation gets flooded, "there's the potential to lose indication in the Control Room of what's going on in Containment. So that would be my concern." (**Id** at 22-23) The loss of instrumentation "knocks out important parameters that you are monitoring, Containment parameters that you are monitoring in the Control Room, then the licensed operators do not have those indications such that they can mitigate the accident like they would like to in accordance with the Emergency Operating Procedures." (**Id** at 23)

In CX 1 at § 5.0 Fritts noticed safety issues. Even though the pumps were tagged as "non safety related," each pump motor "is supplied by a separate safety related motor control center." **Id.** at 25. So that even though the component was designated as non safety related according the regulatory definition, they are supplied by a safety related power supply. **Id**. That power supply is different than the supply from an emergency diesel generator from off-site power. According to Fritts,

> Plants are very picky and choosy on what things they power from an emergency diesel generator. The diesels have limited power capability and you can only -- you only supply power to those things which are absolutely necessary in the event of an accident.

The sump in CX 10 was powered by a separate safety related motor control center. (**Id** at 26-27)

The term "important to safety" is a term that has been used in the nuclear industry within the last three to four years. (CX 45 at 29) Fritts testified that according to Plant Manager Guidelines, "it is also ingrained in every employee year in and year out that no concern is unwarranted." (CX 45 at 30) "There was to be a high regard for those who brought up safety

concerns, that's in fact why the Condition report system grew by leaps and bounds." In 1999 the number of Condition reports went from around 5,000 to over 30,000. Employees were "heavily encouraged to write Condition reports anytime they had any concern, no matter how small." The philosophy changed as a result of the NRC shutting down the Cook Plant in 1997. "We did not have a safety focus and we weren't documenting adequately our corrective actions that we took for concerns, so the CR system was, it was - well they put in a new CR system and everyone was encouraged to document each concern and each one of them was dealt with independently." (CX 45 at 31-32)

To get into the Containment Building, the worker has to get approval from radiation protection to determine what the proper dress-out code is. The Containment Building contains radioactivity emissions and contamination. (T 155) Whenever the Complainant sees a work order bringing him into the containment unit, his reaction is that:

> You should always be at a very high level of awareness at a nuclear plant. And when you see containment, to me that just means you want to exponentially raise what you are already at. You want everything to be absolutely perfect before you make a move. (T 156)

In CX 10, the phrase "Core Safety System/Component" on page CR 0024 refers to equipment that is "safety related" as that term is used under the safety regulations. (T 663)

RX 13 (now CX 13A) was a report from Field Service Manager Boggs to Employee Concerns Manager Mike Horvath in which Respondents considered the "the termination of the subject employees as wrongful." Boggs added that he discussed with Respondent's employees

> Liberty's policy with regard to harassment, intimidation, and/or termination for employees raising concerns over nuclear plant safety. Liberty and AEP will support employees raising such concerns, and shall not tolerate any type of harassment or intimidation. (RX 13)

In his memo to AEP, Boggs testified that with respect to the incident involving McNeill and Pappalardo, that Respondents "fully supported the workers' right to voice concerns." (CX 13 at 2) By "concerns" Boggs agreed that he was referring to all

concerns “including safety or other concerns about operation...” (T 770)

Boggs testified in his deposition that the fluids in the reactor/Containment Building “would be really nasty stuff down there because it is drained out on the floor, you know, it is not going to be real clean water.” (CX 33; T 775) Boggs admitted that the fluids “would be contaminated ... if it was Containment and you had liquids, they’d be contaminated liquids.” (T 776)

Also, a pressurized water reactor like the one at Cook has boron concentration. Boron, a “neutron poison,” is used to control the reaction generated by the uranium fuel. (T 776-777)

5. Complainant Was Terminated By Respondents.

CX 13 is a memorandum dated February 17, 1999 from Marcus W. Boggs to AEP Maintenance Manager, John Boesch. It states in part:

> On February 10, 1999 Mr. Woodrow Hall, Liberty’s on-site Project Manager, terminated Mr. Paul Pappalardo and Mr. Mike McNiel [sic] for refusing to work on a JOA which they felt required additional information. The AEP Employee Concerns Group conducted an investigation. Having interviewed both Pappalardo and McNiel, along with other Liberty personnel and supervisors, the following was determined:
>
> - The termination was considered wrongful. The employees were voicing a valid concern over the JOA.
>
> - Mr. Hall had not processed a Condition report that had been generated almost 30 days previously.

The statements set forth by Boggs are congruent with the facts as relayed by the Complainant, Pappalardo and John Boesch. Complainant only received CX 13 in the course of exchange of discovery during litigation. (T 304) CX 13 is the same as RX 11 which was originally an exhibit propounded by the Respondents. **See** Respondent’s List of Exhibits in Respondents’

Third Amended Pre Hearing Exchange. Boggs never told Complainant that the company was backing him up on a valid concern over the job order activity. (T 309)

Complainant understood that Woody Hall was the head guy at the Cook Plant for Crane and had authority over the employees there. (T 166) For example, Hall called a meeting and caught some people playing computer games. Hall told Complainant and his coworkers that if he caught them, he would fire "the next guy that was playing on the computers." His hat had the word "superintendent" on it. The back of his hat had project manager. (T 166-167) Hall had authority over the supervisors and presided as the top individual at all the meetings of the Respondents. There were approximately 102 employees onsite under Hall. In the absence of Marcus Boggs or anybody above him, the highest ranking person at the Cook site was Woody Hall. (T 168) During an approximately 10- month period, Boggs came to the plant about four times. (T 169)

Despite the existence of CX 13, Marcus Boggs testified that neither Woody Hall nor Tom Brown had any hiring or firing authority. (T 703-704)

Boggs testified that neither Complainant nor Pappalardo was terminated because that would have been contrary to Respondents' policy. (T 716) Boggs' directly contradicts his own statements in his report to AEP in CX 13 in which he declares that Complainant was terminated. Later in his testimony, Boggs again denied that Complainant had been terminated because Woody Hall did not have that authority. (T 720) Woody Hall testified that he was never told by Marcus Boggs that he had exceeded his authority with respect to Complainant or Pappalardo. (CX 32 at 68)

Woody Hall denied that he ever fired Complainant or Paul Pappalardo. He also denied intending to fire anyone. (T 933) Hall did testify that he did not feel that Complainant merited being discharged, just that he required additional training. (T 939) He denied that he did anything "wrongful", contrary to the representations in CX 13. (T 940) Hall did concede in his testimony that his recommendation for Complainant and Pappalardo on February 10 was a suspension of three days off without pay for both of them. (T 982-983) He was recommending this discipline for "failure to complete the task as directed, sir." (T 983)

Respondents emphasized a mistake that Complainant made in 1998 in one of the units. (T 1060) In fact, Complainant accepted responsibility for the mistake he made. Along with other workers, he resolved to flyspeck every work package thoroughly before starting work. As he testified:

> I made a mistake once, it was never ever going to happen to me again in my life. I'm not going to allow anything to go wrong. There is a difference between making a mistake and knowingly violating a policy, a procedure, a regulation and things like that. I try and stay within the boundaries of what I'm taught to do. (T 1062)

STAR was meant to correct the kind of mistakes he and others made in 1998.

> Q. You understood that the term STAR, S-T-A-R, meant for you to stop, think, act and review?
>
> A. That's what I did, I stopped. I stopped when we looked at the package and it was no good. (T 1062)

Complainant testified that he was not fired because the STAR sheet was incomplete. The problem arose because he refused to work a defective and unacceptable work package. (T 1063)

In the Affidavits of Paul Pappalardo, in evidence as CX 18, Pappalardo states that Tom Brown had told him on March 23, 1999 that Woody Hall had told Tom Brown to fire Complainant and Pappalardo. This took place just before Woody Hall himself fired them. (T 285)

Accordingly, in view of the foregoing, I find and conclude that Complainant was, in fact, terminated by Respondents.

6. Complainant Was Terminated For Refusing To Falsify Documents.

CX 13 establishes beyond doubt that Complainant was terminated for refusing to work on a job order activity that required additional steps. Not only that, the document indicates that the termination was wrongful. "The employees were voicing a valid concern over the JOA." CX 13 also verifies

that Woodrow Hall had not processed a Condition report submitted by the Complainant. The Respondents admit in CX 13, furthermore, that the following week, Marcus Boggs met with personnel of Respondents and discussed the issues associated with Complainant's termination. In his words, "I specifically stated that Liberty and AEP would not tolerate any type of retaliation, harassment, or discrimination against persons raising safety or other concerns about operations or quality within AEP NG." (Emphasis added)

CX 13 was not an internal memorandum, but a report from Liberty Technical Services to AEP Maintenance Manager John Boesch. CX 23 establishes that the employer initially gave an inconsistent reason for termination of the Complainant, namely "lack of work." Then it changed the reason on the second page of CX 23 to state that the employee failed to return to work. (T 352) Woodrow Hall testified that he was sending Complainant and Pappalardo home for their belligerent attitude. After both left the site and went to the NRC, he was summoned by Michael Horvath of AEP Employee concerns. Hall did not like the attitude of the AEP Employee Concerns Representative. (CX 32 at 46-47) Horvath first told Hall to "sit down, shut up, and we will let you know." (CX 32 at 47) Hall continued as follows:

A. Anything other than that?

Q. Yes.

A. I think his first line was, "Do you know what adherence is?"

Q. Okay.

A. And that put me on the wrong foot with him.

Q. Did he say adherence to what?

A. No. He just said, "Do you know what the word 'adherence' means?"

Q. Did Mr. Horvath indicate to you that he had talked with McNeill or Pappalardo?

A. No.

Q. Did he indicate to you that he knew anything about

the incident, involving the work package?

A. No.

Q. Do you know what the discussion was about with Horvath?

A. I ended that discussion with Horvath.

Q. Okay. I understand you ended it, but do you know what -- I just --

A. Well, I'll tell what I thought, John. I just went through one interview with one individual, and now another individual comes in with a different attitude, you know, the Mom and Pop game.

Q. All right.

A. That was the impression I got, and I made a statement to Mr. Horvath. I said that this issue was a Crane/Liberty issue at the moment.

Q. Did you or Horvath define what the issue was, I guess is what I'm getting at?

A. No. Mr. Boesch come over and Mr. Horvath never talked to me anymore.

Q. Did you talk to Boesch then when he came over?

A. I just mentioned to Boesch that I thought this was getting out of line, that it was a Crane/Liberty issue; and Mr. Boesch says, "You're upset. Why don't you take the rest of the day off. I know you're going home first thing in the morning. Go pack up and go home for the weekend." (CX 32 at 48-49)

7. Complainant Was Not Terminated For His Behavior Pertaining To A Missing Dial Indicator Or Returning Micrometers In The Early Morning of February 10, 1999.

At an early morning meeting on February 10, 1999, before the issue of the work package in CX 10 came up, Complainant and

coworkers met with supervisors to discuss a dial indicator that Woody Hall felt was missing. (T 343) Complainant believed that the indicator was misplaced and not stolen. (T 343-344) Hall proposed that all precision tools be taken back to the tool room every day. Complainant objected on the ground that the tools were calibrated for jobs that were ongoing. If they were turned back in, they would have to be recalibrated before they can be used again, a procedure which would be a waste of time. (T 344-345) Complainant expressed his opinion and when Hall disagreed and ordered that the tools be turned in, Complainant agreed. (T 345-346) Complainant was never told that this reaction at the meeting concerning the dial indicator was the reason for his termination. (T 346-347)

8. Complainant Could Not Return To Work Until The Issues Of The Work Package, The Unescorted Access, Falsification Issues, And His Status Of Being Fired Were Resolved.

CX 17 and 18 establish that Complainant communicated to the Respondents through his attorney to discuss the aftermath of his termination from employment on February 10th. Nothing in the record establishes any response to either letter.

There was no doubt by Complainant that he was not an employee of Respondents after Wednesday, February 10, 1999. (T 268) Not being an employee of the Respondents, he requested that communications from management go through his attorney because of the severance of the employer-employee relationship. (T 269)

Complainant was also influenced about coming back to work when he received information from coworker Pappalardo that Tom Brown wanted him to falsify another document. On March 30, 1999 Tom Brown had told Pappalardo that a bolt torquing worksheet was missing. Tom Brown “suggested that we could make up a facsimile worksheet. I immediately told him I would not do that. Bob Reynolds who was in the office at that time and was in on this conversation, left the office. Bob Reynolds told me later that he couldn’t believe that Tom Brown asked us to do that.” (CX 18, Second Affidavit of Paul S. Pappalardo)

On the Monday following his termination, Boggs called Complainant and asked why he was not back at work. (T 298)

Complainant replied that no one had told him to report back to work. So, Complainant told Boggs that he would not work for Tom Brown. He again requested that management talk with his lawyer about any re-employment with Respondents until the issues with Tom Brown and work packages were resolved. (T 299)

Boggs acknowledged receiving a letter from Complainant's attorney which he then forwarded to Wayne Prokop for his review. (T 752) And there was no exhibit or testimony to indicate any response from Prokop to the attorney. Boggs sent it to Prokop because "I have other things to do than get involved in talking to somebody's attorney." (T 753) The first time that Boggs talked to any attorney from Respondents was in November, 1999. The letter referred to by Boggs in RX 12 is CX 16. (T 754)

If Complainant had gone back to work for the Respondents, and based upon what happened to his coworkers Bob Reynolds and Jason Delashmette, he felt that he would get retaliated against. He also did not believe what Crane management was telling him based upon the contradictory stories he was getting. (T 300) McNeill found out that no one from AEP or Crane had interviewed his coworkers about being ordered to work the package or be fired. That caused concern with Complainant that they would not check that out. (T 301)

Complainant could not go back to work for Crane without having his unescorted access restored. In all of the conversations with Boggs on February 10, 11, and 15, he never told Complainant that his unescorted access had been restored. In his conversation with Larry Ricks on February 13, Complainant was not told that his unescorted access had been restored. (T 655-656) Respondents had no work available to Complainant's knowledge outside the protected area that did not require unescorted access. (T 656) Neither Boggs or Ricks ever communicated to Complainant what the status was of his badge or unescorted access. (T 656)

When Pappalardo was offered a job to come back to work after his termination, he was given the position of a foreman. Complainant was not offered any such position. (T 666-667) There was no discussion between Complainant and Larry Ricks or Boggs about resolving any of the issues that Complainant had raised during the course of his employment about Condition Reports, defective work packages, or fraudulent entries. (T 668)

Boggs testified that Complainant told him that he did not want to come back to Cook working for Respondents. He brought us issues that he had with Tom Brown. (T 730) Boggs admitted that there was tension between him and Complainant in the initial conversations. Boggs also knew that Complainant was angry at Tom Brown as of February 15. Pappalardo testified in his deposition that he was very angry at Tom Brown. (CX 31 at 44; T 763-764) Boggs did not investigate Complainant's allegations that he was asked to put his name on documents on which he had not worked. Second, he did not know what was the disposition of the Condition Report that was referenced in CX 13 at the second "bullet." Third, he did not bring up with Complainant any resolution of the February 10 work package or the Condition Report. (T 782-784) Boggs testified that he had no idea that one of Complainant's concerns about returning to work was the resolution of the above issues. (T 784) It had "never" crossed his mind that it might be a concern to him to have those issues resolved. (T 784)

With respect to reinstatement, Complainant testified on rebuttal that in hearing the testimony for nearly five days, he became aware of a lot of documentation and evidence concerning his termination. (T 1048) He had the time to reflect on reinstatement at the present time as an appropriate remedy with the Respondents. Complainant emphasized the value of trust and truth on the part of an employer. (T 1048) With respect to reinstatement, Complainant testified that he simply is not able to work for an employer who lies as much as the Respondents did at the time of the alleged investigation surrounding his complaints. Instead of reinstatement, Complainant requests front pay as well as emotional distress damages because of the inability to work for Respondents. (T 1049)

9. Complainant's Efforts To Find Work After His Termination.

After Complainant was terminated, he contacted a number of employers. After applying at North American Power and Resources with a resume, he stayed in Michigan because he thought it was a good prospect for work. When he did not receive the job, he moved back to his home state of Washington. He continued to look for work and documented his efforts in CX 28. Complainant testified that he actually has contacted more places than those listed in CX 28. (T 357)

The first job that Complainant obtained was for E2 Services, which lasted only 10 days. One of the problems that the Complainant faced in finding work was that he had no document such as CX 13 to show prospective employers before September, 1999. Also, there were conflicting documents such as CX 23 which stated that he was laid-off. Between February 10 and September, 1999, Complainant did not have a document such as CX 13 or any other document that he could use to explain the denial of his unescorted access to the Cook Plant. (T 358-359) Not only did he have no documents to explain his termination, he had two unemployment documents that controverted it. (CX 23)

CX 27 was a typical employment questionnaire for a nuclear contract. On page 2, it asks the following questions:

> 2. Have you ever been *granted unescorted access* to any nuclear facility? Yes ___ No___ If yes where? (Most recent occurrence only)? Name of employer.
>
> 3. Have you ever been *denied access* to any nuclear facility? Yes__No__. If yes explain. (emphasis in original)

Complainant testified that question number 3 typically shows up with contractors or licensees at nuclear power plants. (T 371)

Complainant testified that if one has been in a nuclear plant in the last year versus the last 30 days there is a big difference in disclosure. Had Complainant been working in a nuclear plant within the last 30 days, it would be much easier to get his badge and unescorted access. If a worker has been out longer,

> You have to account for all your days off work plus every job that you have worked. If you've been arrested for any reason, other than a traffic ticket, you have to disclose. A lot of them ask about have you ever been denied unescorted access. Or, have you ever been fired while working in a nuclear facility? And you have to be very forthright and disclose all of that information. (T 359)

If the Complainant had lied about being denied unescorted access at the Cook Plant, that would have been a falsification which, if discovered, would have denied him access to a nuclear plant.

(T 360)

Complainant was a forthright and honest worker who knew he could only answer truthfully questions about his past employment history. For example, the application for the South Texas Project job that he obtained in the Fall of 1999 asked if he had been denied unescorted access or was fired, discharged or asked to resign by a previous employer. (CX 25 at 4) Complainant could only respond, and did respond, that he had had his unescorted access denied and that he had been fired. Consistent with his testimony and statements to the NRC, Complainant stated as follows in response to questions 2 and 8 on that questionnaire:

> I was fired at Cook by Woody Hall who was the Superintendent/Project Manager for Liberty/Crane Nuclear. Hall fired me and a coworker when we returned to evaluate D.C. (Cook) Plant policy. Hall and my immediate supervisor Tom Brown wanted me to work a defective package. Please see documents attached immediately after this page.

(CX 25 at 4) The attachments were CX 13.

When Complainant was asked if he had been denied unescorted access, he would have to answer "yes." (T 360) In addition to the written response explaining the denial of unescorted access and why he was fired, the employer wanted to know everything pertaining to what happened at Cook. Complainant found it "just a worrisome thing to sit there and have people ask you a half dozen times are you sure you haven't left anything out. So, you try to be, you know, as truthful as you can." (T 371) Complainant, having driven 2,500 miles to try to get the job at South Texas and having paid all of his own expenses, would be in financial trouble.

Complainant found it a very uncomfortable process to wonder if he was going to make it through the interview because of the prior incident at Cook. If the plant denies access, "no one else is going to give it to you. It is your only shot. Once you get through that door there, that can make it easier. But, if you don't make it there, you're dead." (T 372)

If the licensee such as American Electric Power or South Texas Project denies access, the worker can not obtain work with any subcontractor at that site. (T 374) "You can't even go to

another nuclear plant. Because that plant has control of your badge at that particular moment in time." (T 374)

When asked on cross-examination whether Complainant's site access status in the P.A.D.S. [Personal Access Data System] system information indicated in RX 51 that he was favorably terminated on February 10, 1999, Complainant replied:

> As a matter of fact, that might get my badge pulled, because I have to report that I was fired and that my badge was pulled. How could that, which contradicts the truth that I have to tell, be favorable to me? (T 481)

Complainant's job has always been inside the protected area where unescorted access is essential. (T 374)

Complainant understood that work was available with the Respondents at sites other than Cook. Respondents had a contract at the Oconee Nuclear Plant. Had Respondents offered Complainant a job at a site other than Cook, he would have taken the job. (T 398-399) Complainant had experience in repair and maintenance of valves and pumps. (T 399) He had worked valves out at South Texas Project (STP) and a few at Cook. In his resume in CX 22 he listed his experience in repairing and maintaining valves. (T 400)

If Complainant had known in December, 1999 when he applied to STP for unescorted access that he could be re-badged, that would not have solved his problem. (T 660) No matter where he worked in the future, and no matter what Cook represented, he knew that he had been denied unescorted access when he was fired and his badge was pulled. How prospective employers interpret that is another matter. What mattered to Complainant was that he had to answer truthfully that he had been fired and that he been denied unescorted access at the Cook Plant. "And every plant that I go to in the future, I will put that down because I want to be right up front with them. I don't want anybody to come up and say why didn't you tell me this." (T 661) Even if Complainant had RX 44, he would not have filled out the last page of CX 25 any differently in terms of his termination or a denial of unescorted access, because that is what actually happened. (T 661-662)

In his conversation with the Complainant, Boggs testified that if he was not receptive to going back to the Cook site for

Respondents, we would get him a job at another site where Respondents had work. (T 722) Boggs did not state what other site there would have been. (T 722-723) Boggs testified that "we had other projects going on at that point." These included South Texas Project, Comanche Peak, and a number of other sites. "That's the busiest time of year for us is February, March time frame." (T 723) Complainant's employment could have been continued through the completion of "one outage and then follow up with another one. It could have gone up through May, June of that year; May or June. Often times we line up guys with work back to back on outages." (T 723)

Boggs testified that "often we line guys up for multiple back to back shut downs..." (T 761) Respondents have contracts all over the country. In the deposition of Marcus Boggs admitted as CX 33, he described the numerous contracts that Crane had from February 10, 1999 until the time of his deposition in mid-December, 1999. Since December, 1999 until the date of the hearing, there were at least 20 to 25 similar contracts. (T 761-762) In his deposition, Marcus Boggs testified that the Respondents had many other contracts for valve and pump work after February 10, 1999. As far as Liberty was concerned, Boggs testified that "there are so many of them. There are so many of them." (CX 33 at 54) He added:

> And Crane Nuclear had a whole bunch of other contracts that I didn't have.
>
> Q. Well, you are dealing with the valve and pump contracts?
>
> A. And Crane Nuclear is the same way. We are all one, it is basically one big company.
>
> Q. Why don't you just tell me about the ones that you went on?
>
> A. I run (sic) jobs at Cooper Station, Cooper Nuclear Station in Nebraska, Washington Public Power Supply System.

Boggs described the various work that was going on from February 10 until the date of his deposition on December 6, 1999. (CX 33 at 55-65) Boggs testified that even if work at various sites lasted only 30 days in one plant, the Respondents try to keep a work crew together from site to site. (CX 33 at 58) The other

jobs that were available paid between $15.00 to $18.00 per hour plus per diem. (CX 33 at 64-65) In terms of the individuals who had work at Cook, Boggs testified that Woody Hall was working at the Oconee Station after February 10 to the time of the deposition. (CX 33 at 68)

Boggs did not know if Pappalardo worked for Crane after the Cook project. RX 42 is a Complaint filed by Pappalardo alleging that he was "blackballed" by the Respondents for his protected activity at D.C. Cook. Exhibit CX 46 is a document verifying the allegation of protected activity made by Pappalardo to the Nuclear Regulatory Commission.

Woody Hall described the work that he did for the Respondents and that was available throughout the country after February 10, 1999 up to the point of his deposition on December 14, 1999. (CX 32 at 7-16) He worked approximately 185 hours of overtime for Respondents since March, 1999 to December 3, 1999. (CX 32 at 16)

Wayne Prokop testified in his deposition that there was plenty of work available after February 10, 1999 until the time of his deposition on January 13, 2000. (CX 34 at 16-25, 27-35)

Kathy Burkett testified that an "administrative hold ... will prevent a worker from entering the protected area of the plant." (T 823) Referring to the P.A.D.S. (or Personnel Access Data System), Cook's records reflected that on February 17, 1999 there was access termination for Complainant effective February 10, 1999 under favorable conditions. (T 824-825) Between those two dates, Complainant's access was on administrative hold. (T 825) Although Burkett testified that Complainant was not denied unescorted access after February 10, she admitted that the effect of the administrative hold was that "he could not access the protected area of the plant." (T 826)

RX 50, a document generated by Cook, reflects a revocation of Complainant's unescorted access as of February 10, 1999 due to a layoff. The information about the layoff came form Respondents, and is a representation that is not true as Complainant was terminated. (T 832) Cook did not make any independent determination as to the truth of the reason for denying unescorted access. (T 832) RX 50 was filled out by Jean Carpenter from Respondent Liberty Technologies. Burkett testified that under CX 38 at pages 11 and 12, one of the reasons for unescorted access is "terminated for cause."

Another reason is for a layoff. (T 837-839) Burkett does not take steps to verify the information on RX 50; she simply acts on it assuming that it is true. (T 839-840)

Generally in the industry, based upon the requirements of CX 38, background information is reviewed in accessing access to come into the plant. These issues include felony arrests, denials at other facilities, and "other information that would adversely reflect upon the reliability and trustworthiness of the individual." (T 840) That standard used is part of federal Law. (T 841) If someone applies to a plant for unescorted access and lies on his application, that is an important factor in deciding whether or not to grant unescorted access. (T 841) If, after review, it is determined that a lie was made on the application, the plant could revoke the access. (T 841-842) Burkett testified that that has been in fact done before. (T 842) CX 39 at 4 under Section 6.2.1, entitled Employment History, nuclear plants generally adhere to that standard. If a worker stated that his badge were placed on administrative hold or revoked, the Access Control Supervisor would probe more deeply as to why it was denied or revoked. (T 843)

CX 39 at 4 is the background investigation regarding employment history of the worker seeking access to a nuclear plant. It probes the reason for termination and the reliability and trustworthiness relating to unescorted access. **Id.** Employment history is looked at. (T 845). On RX 50, if a worker is terminated for cause, Access Control researches it further to find out what the cause was. If the employer states that it was a layoff, then the plant assumes that was a favorable condition. (T 850) The designation of "terminated favorably" on RX 50 is predicated upon the layoff status on RX 50 is truthful. (T 850-851)

RX 50 was never sent to the Complainant. (T 854) Other employers would have access to information on RX 50. (T 855) Access Control applications for the Cook Plant ask if the worker has been denied unescorted access. It also asks for the reason why. This is typical of all nuclear power plants. (T 856) Denial of unescorted access means a worker cannot work at the nuclear facility. (T 857) If an employee indicated on his Access Control application that he had been denied unescorted access, Burkett would expect him to give a full and truthful accounting of why that access was denied. If an employee did lie about why his unescorted access was denied, there could be

a possible revocation of his unescorted access at the plant. (T 861)

In response to questions from this Administrative Law Judge, Burkett testified if a worker had been laid off from a nuclear power plant for 30 days or less they need nothing to transfer to another nuclear facility. There is no need for any background check, drug screen or anything else. If a worker has not worked at a plant for between 30 and 365 days, a drug screen and inquiry to the previous employer pertaining to fitness for duty matters is required. If the worker has been off for between one and five years, Access Control goes back to the previous employers for an update on their employment history. (T 863-864) Burkett testified that the last page in CX 25 under question number 2 that a worker who has been denied unescorted access for any reason would answer that in the affirmative. (T 866-867)

C. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Standards of Review of Section 211 Discrimination.

The "paramount purpose" of the environmental whistleblower provisions is the "protection of employees." The laws are remedial legislation and should be broadly construed by the Department of Labor and the courts. A narrow or hypertechnical interpretation of the laws will do little to effect the statutes' remedial purposes. The amendments were passed in order to help enforce U.S. environmental laws, enhance environmental quality, and protect public health and safety. Under these laws, employees are encouraged to report violations of the law. In accordance with this underlying philosophy, the DOL "does not simply provide a forum for private parties to litigate their private employment discrimination suits," but also "represents the public interest." **Beliveau v. DOL**, 170 F.3d 83, 87-88 (1st Cir. 1999).

As explained in a nuclear whistleblower case decided by the U.S. Court of Appeals for the 6th Circuit: "Under this anti-discrimination provision [Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851] ...the need for broad construction of the statutory purpose can well be characterized as 'necessary to prevent the Nuclear Regulatory Commission's channels of information from being dried up by employer

intimidation.' " **DeFord v. Secretary of Labor**, 700 F.2d 281,286 (6th Cir. 1983).

In a subsequent and concurring opinion in **Rose v. Secretary of Labor**, the Sixth Circuit held that Congress' intent in passing the nuclear whistleblower protection act, was to "encourage employees" to report "unsafe practices in one of the most dangerous technologies mankind has invented." Judge Edwards identified the remedial scheme behind the whistleblower protection provisions:

> If employees are coerced and intimidated into remaining silent when they should speak out, the results can be catastrophic. Recent events here and around the world underscore the realization that such complicated and dangerous technology can never be safe without constant human vigilance. The employee protection provision involved in this case thus serves the dual function of protecting both employees and the public from dangerous radioactive substances. **Rose, supra**, 800 F.2d 563,565 (6th Cir. 1986).

To show discrimination under 42 USC Sec 5851, the Complainant must establish a **prima facie** showing of discrimination. The burden then shifts to the employer to produce evidence that its adverse action was motivated by a legitimate, non-discriminatory reason. If it does so, the burden of production shifts to the employee to establish that the offered reason was a pretext and that protected activity was more likely the motivation for the adverse action. **Bechtel Construction v. Secretary of Labor**, 50 F. 3d 926 (11 Cir. 1995).

In order to establish a **prima facie** case of discrimination, the employee must show (1) that the employer is covered by the Act, (2) that the employee engaged in protected activity, (3) that the employee was terminated or suffered other adverse action, and (4) that there is an inference of causation between the protected activity and the adverse action. **Id.** Proximity in time is sufficient to infer causation. **Id.**

Respondents do not contest the fact that they, as nuclear contractors, are covered by the ERA. They deny, however, that Complainant was engaged in protected activity or that he was terminated. Section 211 provides as follows:

(a) Discrimination against employee

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions or privileges of employment because the employee (or any person acting pursuant to a request of the employee)

(A) notified his employer of an alleged violation of this Act or the Atomic Energy Act of 1954 (42 U.S.C. 2011, **et seq**.);

(B) refused to engage in any practice made unlawful by this Act or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;

2. Burden of Proof

Congress, in amending Section 210, attempted to "facilitate relief for employees" by explicitly lowering the burden of proof in nuclear whistleblowing cases. This provision, which used language similar to the burdens set forth in the Whistleblower Protection Act of 1989, was intended to eliminate the requirement that employees prove that animus was a "substantial" factor in a discharge. Under the "old" Section 210, the DOL followed the traditional burdens of proof and persuasion set forth in **McDonnell Douglas** and **Mt. Healthy**. **Carroll v Bechtel Power**, 91-ERA-46, at 8-12 (2-15-95), **aff'd**, 78 F.3d 352 (8th Cir. 1996).

Under Section 211, Congress enacted a "free-standing evidentiary framework" which modified the **McDonnell Douglas/Mt. Healthy** burden:

The Secretary may determine that a violation of subsection (a) of this section has occurred only if

> the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) of this section [**i.e.**, protected activities] **was a contributing factor** in the unfavorable personnel action alleged in the complaint. Relief may not be ordered under paragraph (2) if the employer demonstrated **by clear and convincing evidence** that it would have taken the same unfavorable personnel action in the absence of such behavior. 42 U.S.C. 5851(b)
> (3)(C) & (D). (Emphasis added)

Under the new frame work an employee still has the initial burden of proof to establish, by a preponderance of the evidence, the standard **prima facie** case. The first significant difference between the standard Title VII evaluation and the new statutory burden concerns the proof of necessary discriminating animus. Employees need not demonstrate that animus was a "significant" or "motivating" factor behind an adverse action. Under the new formulation an employee need only demonstrate, by a preponderance of the evidence, that protected activity was a "contributing factor" in the adverse action. **Stone & Webster Engineering v Herman**, 115 F.3d 1568, 1572 (11th Cir. 1997).

The new "contributing" factor test completely displaced the "motivating" factor test:

> The words "a contributing factor"...[mean] any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to over-rule existing law which requires a whistleblower to prove that his protected conduct was a "significant", "motivating", "substantial", or "predominant," factor in personnel action in order to overturn that action [emphasis in original]. **Marano v. Department of Justice**, 2 F.3d 1137, 1140 (Fed. Cir. 1993).

Once the employee meets the "contributing factor" burden of proof, instead of the traditional burden of production shifting to the employer to articulate a reasonable basis for the adverse action, the burden of proof is now raised to a "clear and convincing" standard, a "higher" standard of proof than the preponderance of the evidence" standard.

The new standard of proof in Section 211 was summarized by the ARB as follows:

> 1. whether the complainants establish by a preponderance of the evidence that their protected activity was a contributing factor in [the adverse action], and if so;
>
> 2. whether [respondent] demonstrated by clear and convincing evidence that is would have [taken the adverse action] in the absence of their protected activity. **McCafferty v Centerion**, 96-ERA-6 Order of ARB, at 9 (September 24, 1997).

In the present case, examples of violations of federal regulations include the following. **See** Exhibit 6.

- Violations resulting from inadequate procedures unless the individual used a faulty procedure knowing it was faulty and had not attempted to get the procedure corrected.
- Recognizing a violation of procedural requirements of and willfully not taking corrective action.
- Falsifying records required by NRC regulations or by the facility license.
- Submitting false information and as a result gaining unescorted access to a nuclear power plant.
- Willfully providing false data to a licensee by a contractor or other person who provides test or other services, when the data affects the licensee's compliance with 10 CFR Part 50. Appendix B, or other regulatory requirement.
- Willfully providing false certification that components meet the requirements of their intended use, such as ASME Code.

The pertinent regulations are contained in Exhibit 6 that include 63 Federal Register no.. 92, 10 CFR 30.10 and 10 CFR

30.1.

3. Complainant Engaged in Protected Activity Which Led to His Termination.

The component that the Complainant was to work on with his co-worker on February 10, 1999 was a "Containment Annulus Pipe Tunnel Sump Pump 'A'. (CX 10; CX 1 & 2) A sump pump drains fluids that have accumulated. If a coupling in a sump pump blows out, there could be a flooding condition, which in turn could affect electrical panels in the containment unit. (RX 49 at 206) Depending on the amount of radioactive water that has built up in the containment unit, the sump pump would be used to divert such water. Failure of the sump pump could result in an increased level of contaminated water.

Respondents' agents requested Complainant and his co-worker to rewrite certain work packages and authenticate that work was done when in fact neither Complainant nor his co-worker had done the work. False validation of work done on pumps and motors would obviously be a safety concern to the licensee, and I so find and conclude..

The Respondents rely on the label "non-safety related" at Exhibit 7 at 32 for their conclusion that Complainant did not engage in any safety-related activity. However, the term "safety- related" is a term of art that relates to the systems and components involved with reactor coolant pressure, the capability to shut down a reactor, or mitigation of consequences that could result in offsite exposures. 10 CFR part 50.2. It has nothing to do with auxiliary safety systems which do not relate to the safe shutdown of the nuclear core. For example, if there is a failure on the part of a pump motor, the consequence of that failure is an accumulation of water, possibly contaminated, within the containment unit. The safety of the plant could be impacted even if the failure had nothing to do with shutting down the nuclear core. Indeed, the plant had already been shut down because of an order from the Nuclear Regulatory Commission since September, 1997. Only in the year 2000 has the plant restarted its reactor units. Respondents' argument that safety considerations are irrelevant when a plant is shut down is rejected because the entire purpose of an outage is to work on systems and components that will work once the plant is operational, and I so find and conclude.

A line of cases has emerged under which the employee need demonstrate only that he reasonably perceived a violation of the underlying statue or regulation. When a complainant alleges a violation, it does not matter if the allegation is ultimately substantiated; rather, it need only be "grounded in conditions constituting reasonably perceived violations of the Acts." **Minard v. Nerco Delamar Co.**, 92-SWD-1 (Sec'y January 25, 1995), slip op at 8 (pertaining to environmental violations); **Yellow Freight System, Inc. v. Martin**, 954 F 2d 353, 357 (6th Cir 1992;) **Johnson v. Old Dominion Security**, 86-CAA-3 (Sec'y May 29, 1991), slip op at 15; **Aurich v. Consolidated Edison Co.**, 86-ERA-2 (Sec'y April 23, 1987), slip op at 4.

In a whistleblower case evidence of management's attitude toward safety is highly relevant. An employer's attitude toward the raising of safety issues, such as past instances of "deliberate violations" of the safety procedure, may provide evidence of "antagonism" toward environmental regulations and also "provide support" for raising an "inference of retaliatory intent" against the employee.

Furthermore, the identification of concerns by an employee need not have a direct effect on nuclear safety to be protected activity. In **McCafferty v. Centerior Energy**, 96-ERA-6 (ARB Oct. 16, 1996), the Administrative Review Board held that:

> It is not necessary, in order for an employee's action to be considered protected under the ERA whistleblower provision, for that action to have a direct effect upon nuclear safety. Thus, for example, it matters not that an employee complains about a hazard that has already been corrected, or complains to the NRC about a condition that the employer is already aware of. The complaint may still be considered protected activity. If, in order to come within the protection of the ERA's whistleblower provision, an employee had to determine whether the condition he or she wanted to report had already been discovered by the employer, or was already being addressed by the NRC, employees would be discouraged from bringing potentially significant complaints to the attention of authorities. If [Respondent's] theory were correct, an employer who had created a nuclear hazard and had been cited for it by the NRC, could retaliate with impunity against an employee who belatedly reported that violation to the NRC. The language of

Section 211 does not require such a far-fetched result. ...[7]

_____

> [7] That is not to say that an employer's actions to correct a hazard are not relevant in a retaliation case. The fact that a hazard has already been addressed by an employer before an employee complains about it might be highly relevant to the issue of the employer's motive to retaliate.

In **Minard, supra**, the complainant mistakenly believed that the dumping of antifreeze and oil was a violation of the Solid Waste Disposal Act, whose whistleblower provisions are virtually the same as those under the ERA. The Secretary held that under the reasonable belief test, a complainant who has a reasonable belief that a substance is hazardous and regulated is protected under the Act. Slip op at 6-7. Because it was reasonable for that complainant to believe, based upon his own observations, that these were hazardous wastes subject to EPA regulation, the Secretary held that that complainant engaged in protected activity.

In attempting to draw boundaries between what is protected and what is not, the administrative law judge in **Cox v. Lockheed Martin Energy Systems, Inc.**, 1997-ERA-17 (ALJ Feb 8, 1999) found that the complainant did not engage in protected activity where the concerns he expressed were related to cyanide intoxication, which were not related to nuclear safety, but were occupational safety matters that fell outside the jurisdiction of the Act. In the present case, the Complainant refused to work a defective work package that related directly to a pump that is designed to draw out radioactive water from the sump inside the containment unit to a "hold-up tank" outside the containment unit. Radioactive water, and potential defects relating to sump pumps that are designed to draw the water out of the containment building, clearly relate to nuclear safety. **Affidavit of Michael McNeill.**

In **Du Jardin v. Morrision Knudsen Corp.**, 93-TSC-3 (ALJ Nov 29, 1993), the complainant was mistaken about the quantity of hazardous material which was released into the environment. The Administrative Law Judge observed that the Secretary of Labor and federal courts have found that complaints regarding "possible violations" are considered protected activity. In **Du Jardin**, the Administrative Law Judge found that it was

reasonable for the complainant to have a belief that a violation of the relevant act took place. **Kansas Gas & Electric Co.**, 780 F.2d 1505, 1512 (10th Cir. 1985), **cert. denied**, 478 US 1011 (1986); **McKowiak v. University Nuclear System, Inc.**, 735 F.2d 1159, 1162 (9th Cir. 1984). Thus a mistake by an employee as to whether an actual violation of nuclear safety occurred is not decisive of whether the employee engaged in protected activity. Nor is the issue of whether the employee was actually correct in proving a violation determinative. The primary issue is whether the complaint was based on a reasonable belief of possible violations. **Accord, Richard v. Adams**, 89-ERA-3 (Secretary Aug 5, 1992).

4. Complainant Was Terminated

As I have found the testimony of the Complainant and Mr. Pappalardo to be most credible and worthy of acceptance, I find and conclude that the testimony of Marcus Boggs and Woody Hall regarding whether Complainant and Pappalardo were terminated is simply not credible. When asked why he characterized the February 10th incident as a termination in CX 13 at the same time he was testifying they were not terminated, Boggs replied as follows:

> A. Because I was communicating to the plant what transpired and I was not, at the point in time I wrote these memos, the last thing I was thinking was that this was going to turn into litigation. I didn't have these memos reviewed by an attorney. I am not an employment law attorney myself.
>
> I had no idea of the repercussions of utilizing that verbiage in this memo. (T 746)

When asked if he considered the termination to be wrongful, Boggs testified:

> Q. Did you consider the termination to be wrongful in any sense?
>
> A. What I considered is that the termination was not, there was, there was no termination involved since the approach that was taken was not in accordance or pursuant to Crane's policies.

Q. And what were those policies?

A. Again, that was that any terminations had to be cleared through myself, my manager, Wayne Prokop, and the Human Resources group at Crane.

Q. Now the term wrongful, in what sense did you consider this termination incident wrongful?

A. In other words, it was not conducted in accordance with our policies. It was not considered a termination.

...

Q. Now, on RX 13, can you refer to the termination incident in the subject matter?

A. Yes.

Q. Is that the reason that you refer to it as a termination in the subject matter, is that the same reason as your earlier testimony?

A. That is correct.

Q. And the second paragraph it says, discussion of termination incident. Is that the same term that you're using in the subject matter of both RX 13 and RX 11?

A. That's correct.

Q. And in the second paragraph there's the term wrongful. And is that the same context you used the term wrongful as being either unauthorized or not in accordance with Crane's policies as in RX 11?

A. That's correct. (T 747, 749-750)

However, in an *internal* memo between Boggs and Prokop admitted by the Respondents, Boggs used the same termination nomenclature in describing what happened with Complainant on February 10. (RX 12) Respondents' denial under oath of the obvious and

literal meaning of those words relating to the fact of termination can only be described as willful, premeditated and incredible, and I so find and conclude.

5. The Respondents Have Not Articulated a Legitimate, Nondiscriminatory Reason For Complainant's Dismissal and Have Admitted That His Termination Was Wrongful.

This case is unusual in that, despite Respondent's report to AEP in CX 13, it denies that Complainant was terminated. Thus, Complainant need not rebut a reason for termination which is not given. To the extent that Respondents now rely on Complainant's behavior during the early morning meeting of February 10, 1999, that reason is clearly a pretext, again based upon CX 13, which called the termination wrongful and related directly to the safety concerns expressed by Complainant and Pappalardo on February 10. In either case, Respondents have failed to rebut the **prima facie** case of Complainant.

6. Good Faith Requirement For Allegations.

Under most whistleblower protection laws, an employee is under no obligation to demonstrate the validity of his or her substantive allegations. Although the safety or legal concern that resulted in the initial whistle blower disclosure need only be based on a good faith belief that an actual violation occurred, this "good faith" belief must be based on "reasonably perceived violations" of the applicable law or regulations. Employees are under no duty to demonstrate the underlying veracity or accuracy of their safety allegations. In this vein, allegations remain protected even if facts later demonstrate that the concern was "corrected," that the regulatory agency was "already aware" of the problem, or even if the regulatory authority later rules that the concern was not correct.

An employee's motivation for filing a complaint is, in most jurisdictions, irrelevant, and even if an employer believes that the safety allegations are "trivial," an employee may still be protected. In **Guttman v. Passaic Valley Sewage Commissioners**, 85-WPC-2, (Sec'y 3-13-92), **aff'd**, 992 F.2d 474 (3rd Cir. 1993), an administrative law judge initially rejected an environmental whistleblower claim, finding that the employee's motivation for blowing the whistle was "job and ego, rather than public

pollution protection."

The Secretary rejected this finding, holding that "it is not complainant's underlying motive" for "reporting violations" that "must be established or considered." The whistleblower law protects an employee's conduct "notwithstanding his motives" for blowing the whistle. The Secretary further held that it was "Respondent's motivation" that must be placed "under scrutiny," not the motivation of the employee. This holding was affirmed by the U.S. Court of Appeals for the Third Circuit. **Guttman, supra.**

In **Passaic Valley Sewerage Commissioners v. United Stated Department of Labor**, 992 F.2d 474, 478 (3rd Cir. 1993), the court affirmed the Secretary's protection of an employee who had filed an "ill-formed" complaint due to being "misguided" or "insufficiently informed." The court explained some of the policy considerations underlying this judgment: "Moreover, an employee's non-frivolous complaint should not have to be guaranteed to withstand the scrutiny of in-house or external review in order to merit protection under § 507(a) for the obvious reason that such a standard would chill employee initiatives in bringing to light perceived discrepancies in the workings of their agency." **Id.** At 479.

The NRC also follows this line of reasoning and has determined that employee safety concerns are protected, "regardless of the accuracy" of the allegation.

Usually, courts should not adjudicate the merits of an underlying disclosure, and should refrain from even making findings on these matters. For example, the DOL has reasoned that under various employee-protection laws they lack jurisdiction over substantive safety issues: "[I]t is clear that this office does not have jurisdiction to decide any issues relative to the quality of the construction work in question. Those questions are within the province of other federal regulatory agencies." **Landers v. Commonwealth**, 83-ERA-5 (Sec'y May 11, 1983).

Although complaints need only be based on a "good faith" belief that en employer engaged in wrongdoing, proof of the underlying wrongdoing may be highly relevant in evaluating employer motive and credibility. For example, demonstrating management "antagonism" toward safety regulations or proving a

supervisor disregarded safety procedures is highly relevant evidence of motive. **Timmons v. Mattingly Testing Services**, 95-ERA-40, D&O of Remand by SOL(June 21, 1996).

7. Complainant's Refusal to Work The Package Was Protected Activity.

In a refusal to work situation as here, the safety issue need not directly involve nuclear hazards. Indeed, a non-nuclear safety concern as the basis for a work refusal is protected under the Energy Reorganization Act where retaliatory discharge of the Complainant has a potential effect on nuclear safety. **Beck v. Daniel Construction Co.**, 86-ERA-26 (Sec'y Aug 3, 1993). The statute itself forbids discharge for "refusing to engage in any practice" made unlawful by the Act. 42 USC § 5851(a)(1)(B)

In **Pensyl v. Catalytic Inc.**, 83-ERA-2 (Sec'y Jan 13, 1984), the Secretary held that it is protected activity for a worker to refuse work which he believes is unsafe, unhealthful, or does not comply with regulations.

Significantly, in **Durham v. Georgia Power Co.**, 86-ERA-9 (ALJ Oct 24, 1986), the ALJ noted that if management had requested the complainant to falsify control documents or violate quality control procedures in any way, *his refusal would constitute protected activity.* In the present case, the Complainant was asked on numerous occasions to falsify documents that related to systems and components in the nuclear power plant. Complainant's refusal to engage in such activities vindicates the purposes behind the whistleblower and anti-retaliation provisions of the Energy Reorganization Act, and I so find and conclude.

8. Reinstatement/Back Pay Versus Back Pay/Front Pay.

While reinstatement is the preferred option in these whistleblower cases, such option is not available herein, in my judgment, because the sworn testimony of Respondents' employees, agents and representatives has severed the employer-employee relationship, a relationship that should be based upon a relationship of trust. Where there should be trust, there is now tension and distrust and it is apparent that Complainant cannot return to work for the Respondents. Moreover,

reinstatement of the Complainant is not an appropriate remedy (1) because Respondents, perhaps tongue-in-cheek, have steadfastly denied that he was fired, (2) because no specific offer of a job was ever made by Marcus Boggs and (3) because there was no offer of any specific job at a specific site for a specific wage.

Furthermore, Complainant should not be forced to return to work in an environment "frought with hostility and friction." In this regard, **see Bruso v. United Airlines, Inc.**, 239 F.3d 848, 861 (7th Cir. 2001); **Hutchinson v. Amateur Electronic Supply, Inc.**, 42 F.3d 1037, 1045-46 (7th Cir. 1994).

Thus, as the employment relationship has been severed and damaged beyond repair, I decline to order reinstatement as awards of back pay and front pay are more appropriate remedies, as more fully discussed below.

Where reinstatement is not an appropriate remedy, whether due to adverse conditions at the employer, hostility of management or the other work obtained by the Complainant, "**front pay is available as an alternative to compensate the Plaintiff from the conclusion of trial through the point at which the Plaintiff can either return to the employer or obtain comparable employment elsewhere.**" In this regard, **see Selgas v. American Airlines, Inc.**, 104 F.3d 9, 12-13 (1st Cir. 1997). In **Bruso, supra**, at 862, front pay was an appropriate remedy to place the Plaintiff "in the identical financial position that he would have occupied had he been reinstated."

While Respondents submit that front pay is not appropriate because of the holding in **Giandonado v. Sybron Corp.**, 804 F.2d 120, 124 (10th Cir. 1986), that case is clearly distinguishable because there the Plaintiff **unreasonably** refused reinstatement for the purely personal reason that his wife was ill and because he did not want to work for a certain supervisor, **even though that company had agreed to change supervisors and other working conditions**. However, in the case **sub judice**, I have already found and concluded that Complainant has **reasonably** decided not to return to work for the Respondents, especially as Respondents have yet to offer Complainant a specific offer of reinstatement at a specific site, at a specific wage and with specific job duties. Moreover, Respondents have also failed to make the necessary accommodations the company made in **Giandonado, supra**.

In **Taylor v. Teletype Corp.**, 648 F.2d 1129, 1139 (8th Cir.), **cert. denied**, 454 US 969 (1991), a personality conflict with a supervisor was not a reason to reject an unconditional offer of reinstatement. In the present case, the differences between Complainant and the Respondents were fractured, wholly because of the attempts by their agents to force Complainant and his co-workers to falsify documents and not follow correct procedure with the work packages. The other cases cited by Respondents relate to relatively trivial reasons for not accepting an offer of reinstatement such as additional stress in **Bragalone v. Kona Coast Resort Joint Venture**, 866 F.Supp. 1285, 1296 (D. Hawaii 1994), an ill wife in **Cowan v. Standard Brands, Inc.**, 572 F.Supp. 1576 (N.D. ALA 1983), and isolated hostility in **Saladin v. Turner**, 936 F.Supp. 1571, 1581 (N.D. OK 1996).

In **Slayton v. Ohio Department of Youth Services**, 206 F.3d 669, 680 (6th Cir. 2000) the Sixth Circuit held that ordering reinstatement or another remedy such as front pay is within the discretion of the court. **Hudson v. Reno**, 130 F.3d 1193, 1202 (6th Cir. 1997). The presumption of reinstatement is negated where it "requires the displacement of an uninvolved third party, where hostility would result, or where the Plaintiff has found other work. **Hudson**, 130 F.3d 1202.

In **Suggs v. Service Master Education Food Management**, 72 F.3d 1228, 1234-1235 (6th Cir. 1996), if a court determines that front pay is appropriate instead of reinstatement, the court must specify the duration and amount and reduce it to present value. Complainant has requested front pay in an amount until his retirement and Complainant suggests a discount figure of five (5) percent to reduce the amount to present value. **Berkman v. US Coast Guard Academy**, ARB No. 98-056, ALJ No. 1997-CAA-2 & 9 (ARB, February 29, 2000).

Also, in **Blum v. Witco Chemical Corp.**, 829 F.2d 367, 374, the ARB held that front pay may be used instead of reinstatement where there is "irreparable animosity between the parties." If a productive and "amicable working relationship would be impossible," then front pay may be awarded instead of reinstatement. **EEOC v. Prudential Federal Savings and Load Association**, 763 F.2d 1166, 1172 (10th Cir.), **cert. denied**, 474 US 946 (1985).

In **Michaud v. B.S.P. Transport**, ARB No. 96-198 (January 6, 1997), the ARB adopted a "reasonable person standard" to judge

a refusal by complainant to accept an unconditional offer of reinstatement. This Administrative Law Judge in **Creekmore v. E.B.B. Power Systems Energy Services, Inc.**, 93-ERA-24 (ALJ December 1, 1997) opined that under the new standard of **Michaud** it was reasonable for complainant to receive front pay rather than reinstatement, but was "constrained" to follow a deputy secretary's ruling rejecting an earlier award of front pay in remanding the matter for the purpose of determining back pay and other damages.

In **Boytin v. Pennsylvania Power and Light Co.**, 94-ERA-32 (Sec'y, October 20, 1995), the Secretary of Labor permitted complainant's request for a transfer to a different facility with equivalent pay and supervisory group responsibilities, if possible. In the present case, because of Complainant's willingness to work anywhere in the United States (not just in or near his home state of Washington), he was willing to accept any site other than Cook. Despite Respondents' initial entreaties to this effect, no specific job was ever offered to Complainant, and I so find and conclude.

Even where the ALJ found it difficult to predict the extent of future employment, he awarded front pay in lieu of reinstatement based upon Court of Appeals authority. **Simmons v. Florida Power Corp.**, 89-ERA-28 & 29 (ALA Dec. 13, 1989), **relying on Goldstein v. Manhattan Industries**, 758 F.2d 1435, 1449 (11th Cir. 1985), **cert. denied**, 474 US 1005 (1985) ("front pay may be particularly appropriate in lieu of reinstatement where discord and antagonism between the parties would render reinstatement ineffective as a make-whole remedy."); **Hansard v. Papsi-Cola Metropolitan Bottling Co.**, 865 F.2d 1461 (5th Cir.), **cert. denied**, 58 US Law Week 3216 (1989).

Pappalardo testified that he felt that he was being blackballed by not being transferred where other employees of Respondents were transferred to sites throughout the country. Conspicuously, neither Pappalardo nor Complainant was transferred to any other sites of Respondents.

D. COMPLAINANT REASONABLY MITIGATED HIS DAMAGES.

A complainant who has been discharged must make reasonable efforts to reduce his damages by seeking other employment. The burden of proving Complainant's failure to mitigate is on the Respondent. **Katch v. Speidel**, 746 F, 2d 1136 (6th Cir 1984). The issue of whether the employer has met its burden of proof that the Complainant was unreasonable in not seeking other employment is a question of fact. **Wolf v. Automobile Club**, 194 Mich Ap 6, 17; 486 NW 2d 75 1992. In **Marchese v. Goldsmith**, 1994 US Dist Lexis 7940 (EDPA 1994), the court held that front pay in lieu of reinstatement may be appropriate if circumstances render reinstatement impossible or inappropriate.

In **West v. Systems Applications International**, 94-CAA-15 (Sec'y Apr 19, 1995), if there is such hostility between the parties that reinstatement would corrode the employment relationship, this administrative law judge has the discretion not to order reinstatement, and may order front pay, and I so find and conclude..

There are several reasons why Complainant's refusal to return to Crane on February 15, 1999 was reasonable. First, Complainant had been challenging the decisions of management, specifically his foreman, Tom Brown, that violated plant procedure and federal regulations. Second, the Respondents had no intention of firing Tom Brown or even removing him from his position over the Complainant. Third, there was no attempt by Respondents to reckon with the underlying issues involving improper procedure on the work packages and falsification of documents. Fourth, there was no acceptance of the invitation by Complainant and his attorney to meet to address, let alone resolve, the issues that led to Complainant's termination. Finally, even after the Complainant was terminated, the foreman threatened to fire other workers for refusal to work the packages as written. This pattern of behavior, in fact, continued well after the Complainant was terminated, almost to the end of Liberty's contract with American Electric Power, and I so find and conclude.

It is telling that although AEP has a substantial amount of work during its long outage (nearly 3,000 employees working for contractors at Cook) yet Crane Nuclear, Inc. is not able to secure a single contract with AEP. This is no doubt the result of AEP's own determination that Crane/Liberty is not fit to obtain work at the plant. Complainant should not be penalized for refusing to work in an environment that routinely violates

federal regulations.

With respect to Complainant's attempt to find other work, the suspension of his unescorted access at the Cook Plant has proved to be a major stumbling block. Because Complainant, of course, is obligated to state the nature of any terminations and denial of unescorted access in the past, he must engage in an elaborate explanation to his prospective employers. It is much easier for an employer simply to pick another mechanic than to attempt to unravel the history why Complainant was terminated and why his unescorted access was taken away. Much of the time the Complainant spent not working is attributed to this factor, and I so find and conclude.

As noted above, Complainant has mitigated his damages to the best of his ability and is entitled to an award of back pay, and I reject Respondents' arguments to the contrary for the following reasons: While Marcus Boggs, recognizing the volatile situation at the D.C. Cook Plant, advised Complainant that he would attempt to obtain work for him at sites other than at the Cook, it is apparent to this Administrative Law Judge that Boggs was not serious about such an offer as nothing specific was ever conveyed to the Complainant or to his attorney, despite multiple letters addressed to Respondents' management. I also note the testimony of Marcus Boggs and Wood Hall about the ample amount of work available to valve technicians across the country.

Respondents' attempts to characterize Complainant as inexperienced in valve work is completely contradicted by Complainant's resume (most of which was prepared before litigation began) and by Complainant's testimony regarding his wide experience in maintaining and repairing valves. Respondents simply ignored the Complainant's background in this regard, which demonstrates that their alleged offers of other employment were either conditional or made in bad faith. Respondents' contention that other valve technicians were more experienced is insincere as Complainant was never asked about his experience and never interviewed for any valve technician job.

It has repeatedly been held that uncertainties in establishing the amount of back pay to be awarded are to be resolved against the discriminating party:

> Because back pay promoted the remedial statutory purpose of making whole the victims of discrimination,

"unrealistic exactitude is not required" in calculating back pay, and "uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the discriminating [party]." **EEOC v. Enterprise Assn, Steamfitters Local No. 638**, 542 F.2d 579, 587 (2d Cir. 1976), **cert. denied**, 430 U.S. 911 (1977), quoting **Hairston v. McLean Trucking co.**, 520 F.2d 226, 233 (4th Cir. 1975). **See NLRB v. Brown**, 890 F.2d 605, 608 (2d Cir. 1989)(once the plaintiff established the gross amount of back pay due, the burden shifts to the defendant to prove facts which would mitigate that liability). **Lederhaus v. Paschen and Midwest Inspection Service, Ltd.**, Case No. 91-ERA-13, Sec'y, **Dec. and Ord.**, Oct. 26, 1992, slip op. at 6. **See also, Creekmore v. ARB Power Systems Energy Service**, Case No. 93-ERA-24, ARB **Dec. and Rem. Ord.**, Feb. 14, 1996, **slip op.** at 11; **Hoffman v. Bossert**, Case 94-CAA-4, ARB **Dec. and Ord.**, Jan. 22, 1997, **slip op.** at 2 (ALJ's conclusions that Complainant was entitled to back pay reflecting layoff on earlier of two possible dates rejected because ALJ failed to apply the principle that any uncertainties in calculating back pay are resolved in favor of the complainant); **Johnson v. Bechtel Constr. Co.**, Case No. 95-ERA-0011, Sec. Final Dec. and Ord., Sept. 25, 1995, slip op. at 3; **Nichols v. Bechtel Constr. Co.**, Case No. 95-ERA-0044, Sec'y **Final Dec. and Ord.**, Nov. 18, 1993, **slip op.** at 5-6, **aff'd sub nom. Bechtel Constr. Co. v. Sec'y of Labor**, 50 F.3d 926 (11th Cir. 1995)(Complainant entitled to the presumption that he would have been the last worker laid off from Respondent's crew).

E. COMPLAINANT GAVE RESPONDENTS ADEQUATE NOTICE THAT HIS REFUSAL TO WORK DEFECTIVE WORK PACKAGES BEFORE FEBRUARY 10, 1999 AND HIS COMPLAINTS ABOUT THEM, CONTRIBUTED TO HIS FIRING.

During Complainant's testimony, Respondents objected to any evidence pertaining to defective work packages or Falsification other than CX 10. The basis of the objection was that the issues were restricted only to those articulated in the Second Amended Pre-Hearing Exchange. Complainant's counsel replied

that Respondents were given notice of the other defective work packages in paragraphs 12 through 17 of the Complaint itself. For example, in the District Court lawsuit, Complainant's deposition was taken on November 18, 1999 in which he was asked by Respondent's counsel about claims other than the incident that occurred on February 10, 1999. Counsel for Respondents not only probed the other packages extensively, but was prepared to discuss those issues with his clients as their depositions were taken about a month after the deposition of Complainant in December, 1999. Complainant's counsel recited in detail the many references to defects in work packages that were brought out not only in the Department of Labor Complaint but also in the depositions which occurred some 13 to 14 months before the Department of Labor hearing. **See** T 75-86.

This Court ruled that the Complainant would be allowed to testify as to other defective packages based upon the authority of **Seater v Southern California Edison**, CAA 95-ERA-13 (September 27, 1996). In that case, the Administrative Review Board reversed the Administrative Law Judge's attempt to limit the parties opportunity to articulate their positions and evidence as fully as possible. Given the holding of **Seater**, this Court permitted the Complainant to testify as to other defective work packages that were causally related to his termination. Also, there was no need to amend the Complaint as the Complaint itself mentioned other defective work packages. (T 175-201)

In this respect, CX 13 is no different than RX 26, which was a letter composed by Marcus Boggs describing work incorrectly performed by the Respondent's employees "which simply described the event and listed the corrective actions that we intended to take to insure that it would not happen again or mitigate the possibility of it happening again." (T 715, Marcus Boggs testimony) Boggs testified that, when an incident occurs such as that in RX 26, "I address their concerns that identify what corrective actions we're going to take. And so in this specific instance (CX 13), I drafted several memos to various parties of the Cook Plant, our customers, outlining the actions that I had taken. And so that we could, you know, resolve this, resolve the problems, address the issues and get back to work." (T 742)

RX 13 was another memo from Mr. Boggs to AEP Employee Concerns Manager Mike Horvath dated February 23, 1999 in which the following was stated:

> Discussion of termination incident - summarized incident in saying that AEP and Liberty supported the worker's concerns and considered the termination of the subject employees as wrongful. Both employees were maintained on Liberty's payroll until the conclusion of the investigation, and invited to return to work on 2/15/99.
>
> Liberty's policy with regards to harassment, intimidation, and/or termination for employees raising concerns over nuclear plant safety. Liberty and AEP will support employees raising such concerns, and shall not tolerate any type of harassment or intimidation. (RX 13)

Boggs testified that he wrote the report in CX 13 to John Boesch at Boesch's request. (T 780) Thus, CX 13 is the report of an internal investigation by Boggs to someone else within the Respondent's companies at the request of a representative of AEP who requested that information from the contractor.

F. COMPLAINANT HAS SUFFERED SUBSTANTIAL ECONOMIC LOSSES DUE TO RESPONDENT'S ACTS.

(1) Back-Pay - Wage & Fringe Benefits & Economic Loss.

Complainant preferred the longer jobs such as with Crane and Liberty because he did not have to travel as much. (T 136) Complainant typically worked a regular 40-hour week and ten hours of overtime at Crane. (T 378) He received a per diem of $595 per week, only half of which he had to spend for living expenses. (T 379) The normal work week at Crane was 40 straight time and 10 hours of overtime.

For the entire year of 1999, Complainant earned about $13,741.00. That amount added to the $6,371.00 he earned from Crane was about $20,112.00. Had he worked for Crane for all of 1999 at Cook and other sites on the same terms and per diem, he would have earned:

(52 Weeks) (40 hrs/wk) ($17/hr) =	$35,360
(52 Weeks) (10 hrs/OT) ($25.50) =	13,260
(52 Weeks) ($595/wk per diem) =	30, 940
Total Crane Wages Projected for 1999	**$79,560**

(2) Economic Losses Re-Cap

C	Back Pay:	Wages & Per Diem	
	1999:	($79,560)-(20,112) =	**59,448**
	2000:	($79,560)-(65,000) =	**14,000**
	½ of 2001:	($39,780)-(32,500) =	**7,280**
			$80,728
C	CX 42 Expense to Attend Deposition and DOL Hearing		**7,984**
C	CX 43 Complainant's Spouse's Medical Bills:		**1,790**
C	CX 44 Complainant's Medical Bills:		**3,462**
C	Lost Profit on CX 41 (Est)		**75,000**
			$168,964

For the Complainant, this was not a typical year of earnings. (T 400-401) The year 2000 was more typical in that he earned approximately $60,000.00 based upon his W-2's for that year. (T 401-402[2]) Because W2 documents are not typically released until the end of January of the following year, Complainant did not have them for the hearing in total. (**See** proposed CX 46 and 47)[3]

Complainant explained that he was only able to earn $13,741 after his termination by Respondents for a number of reasons. First, when a worker is on a job for a long time, he is out of the loop in terms of knowing what jobs are available. Second, Complainant had to resolve the discrepancies between the fact that he was fired and the fact that Crane was falsely denying

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[2]Complainant has filed his W2's for the year 2000 to supplement the documents pertaining to his earnings for the year 2000.

[3]CX 46 and CX 47 are admitted into evidence as they are relevant and material to the issues involved herein.

that. In such circumstances, he would have been denied unescorted access by the licensee at the plant to which he was applying until he could prove different. Traveling around the country for interviews was very expensive; he was forced draw down savings for that. (T 402-402)

If Complainant, for example, had said he was fired for refusing to violate procedure in a package, and Respondents stated that he was fired in fact for swearing in the early morning meeting of February 10, "I'm dead in the water. I am not going to get, in my opinion, I will not get unescorted access, my badge will be frozen because I cannot apply at another nuclear facility once I have been denied access at one." Complainant described himself in a "Catch-22 situation until I finally got this letter from Mr. Boggs. (CX 13 in the fall of 99) It was in my record, I had no knowledge it was in there, and that's basically what saved my bacon when it comes to working on nukes." (T 404)

In January, 2000, Woody Hall told Complainant and other coworkers that AEP would be looking to increase their maintenance force. Complainant, among others, filled out an application. A decision would be made from 6 months to 1 year away. Complainant understood, based upon his conversation with AEP Maintenance Manager John Boesch, that there were two years work left at the plant. Whether he worked for Respondents or for the plant itself, he thought that the relationship would be long term. Accordingly, he started to look for land in Michigan and ultimately found 25 acres and made an offer. It had 1,000 feet along the middle fork of the Black River in the country. The land is described in CX 41[4] Complainant was serious enough about the property to check with the electric and phone companies and to see about permits for the septic service. He inquired about precast concrete walls and made a lot of inquiries about floor trusses and roof trusses. The Complainant would have bought the land had he continued to stay in the area. It was a disappointment in his life because he had very big plans for the land. He described it as follows:

Well, I had very big plans. It was a beautiful piece

[4] The date of sale for the property in question was long after Complainant had been fired. It was pulled up on the computer by the office of Complainant's counsel on January 26, 2001.

> of land. Like I said, it had the, I think it was the North Fork of the Black River meandering all the way down so it was like a golden rectangle. It was a third longer than it was wide and this little river ran right down through the middle of it. Trees in fall, it was just a beautiful park-like setting. When snow was on the ground, you'd go up there and see the turkey tracks and deer tracks and I just thought I could turn that, turn that into probably the prettiest piece of ground I've seen in a long time. (T 416-417)

With respect to the land in CX 41, Complainant planned on building sites on it by subdividing the land and building homes. (T 1055-1056) He would have subdivided it into four lots, keeping one lot and selling the others for $5,000 to $8,000 per acre. Three lots at five acres per lot would be sold that would amount to a profit of approximately $75,000. (T 1056)

Complainant had made a point of walking down all of the plan that he could at the Cook Plant. One of reasons that he wanted to go into containment to work on the sump pump was to learn more about the plant and show somebody that he had something on the ball in order to finish out his career at Cook working for American Electric Power. (T 407-408) Complainant inferred that the reason that the Respondents no longer worked at Cook after April, 1999 was because of the incident relating to him. (T 409) Had Complainant been able to work at Cook according to his long-term plan he could have been making $75,000 very easily as a plant mechanic. (T 409) This was slightly less than his projected compensation of $79,560 with Respondents.

Complainant never received a response from AEP. Although Complainant knew that there was no guarantee that he would get work, being terminated in the fashion that he was from the plant guaranteed that he would not. (T 412)

Complainant was born on March 10, 1944, making him 55 years of age on the date of his termination. (T 118) His work background is summarized in CX 22. He started out his work life in the steel mills becoming a millwright after an apprenticeship. A millwright rebuilds and sets rotating equipment. He was a general plant mechanic who worked on valves, pumps, oilers, and coal conveyers. (T 119) At Palo Verdi, he learned about procedures dealing with reactor cooling pumps and job order activities similar to CX 10. He testified

that he has worked many step-wise procedures in the nuclear industry. (T 122) Complainant, prior to coming to the Cook Nuclear Plant to work for the Respondents, worked at numerous nuclear power plants, specifically on pumps and valves. (T 123; CX 22)

RX 32 was admitted to demonstrate that certain members of the Respondents' crew were laid-off as of April 1, 1999. However, nothing on the documents in that exhibit establish where the employees went, just that they were separated from that site. (T 710-711)

Boggs testified that for the pay period February 14, Pappalardo was paid 40 hours regular time and 10 hours of overtime as well as $595.00 in per diem at $85.00 per day. (T 735-736)

The contracts that Respondents had with AEP were annual that could be renewed by AEP each year. They could be terminated with 30 days notification. (T 771) In February, 1999, the contract was renewed at least through the end of that year. (T 772)

Prokop verified that the work of the technicians was $15.00 to $17.00 per hour with a per diem ranging from $70 to $90 per day. (CX 34 at 36)

The "legitimacy of back pay as a remedy for unlawful discharge" is "beyond dispute." Back pay serves to "vindicate the public policy" behind a wrongful discharge statute, it acts as a "deterrence" to future unfair labor practices and it serves to "restore" the injured employee to the same "**status quo**" as would have existed "but for the wrongful act."

The basic black letter law concerning the calculation of back pay was set forth in a whistleblower case as follows:

> The purpose of a back pay award is to make Complainant whole, that is to restore him to the same position he would have been in but for discrimination by Respondent. Back pay is measured as the difference "between actual earnings for the period and those she would have earned absent the discrimination by the defendant." Complainant has the burden of

> establishing the amount of back pay the Respondent owes. However, because back pay promotes the remedial statutory purpose of making whole the victims of discrimination, "unrealistic exactitude is not required" in calculating back pay, and "uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the discriminating [party]." The courts permit the construction of a hypothetical employment history for Complainant to determine the appropriate amount of back pay. Complainant is entitled to all promotions and salary increases which he would have obtained, but for the illegal discharge.

Back pay awards are approximate and "uncertainties in determining what an employee would have earned but for the discrimination should be resolved against the discriminating employer." It is fully appropriate when calculating the amount of damage to "recreate the employment history" of the victim and "hypothesize the time and place of each employee's advancement absent the unlawful practice." Thus, sometimes courts must "engage" in this "imprecise process that will necessarily require a certain amount of estimation" in order to make an employee whole.

Back pay awards should continue to "accrue" until an employer fully complies with a damage award, that is, until an employer makes an "unconditional offer of reinstatement." The offer of reinstatement must be to a "comparable" job. If reinstatement is not sought by the employee, back pay generally continues to "accrue until payment" of the damage "award."

Back pay awards are generally calculated on a quarterly basis. Specifically, an employee's interim earnings "in one particular quarter" have "no effect on back pay liability for another quarter," and I so find and conclude.

(3) Emotional Distress.

Until Complainant got the letter from Marcus Boggs, a document in evidence as CX 13, he thought that there was a "real probability I'd never be able to work in a nuclear power plant again. I thought that would be stopped and it's difficult, like I said, to get back into the loop." (T 412) At the time he was

terminated, he had plans to stay at the Cook Plant and to build a house on the property described in CX 41. Because he had not planned on leaving, he did not have any feelers out for employment other than Cook. (T 413-414) As of February 10th, he did not have any sources or "headhunters" that could provide him with leads for jobs because he did not anticipate getting fired. (T 414)

Complainant described the termination as a shock to his wife. It threw his life into a total upheaval. (T 415)

Complainant suffered in his professional reputation after he was terminated. He testified:

> It wasn't a week, it seemed like, I would make a phone call to somebody and ask them if they knew about any work. Heard about you getting fired. The nuclear community is not that big. We're people, see there's a lot of people that travel around this country just like I do and the work spreads like wild fire. And you know, you don't like people coming up making jokes at you. You have to take it because in the nuclear industry, if you are aggressive or you do something, you know, you get in a fight, it's not a good deal.

Complainant was astonished that he would be fired for trying to correct what he honestly and in good faith believed was a defective work package. What he found most astonishing was that false information that was supplied to the licensee by the Respondents that he had been laid-off. (T 1052-1053) Complainant has suffered anxiety about inability to pay his bills. During the course of the Department of Labor litigation, he was subpoenaed within the sanctity of the Department of Labor proceeding (directly in the courtroom) during a break. (T 1053) The subpoena required that Complainant come back again to Michigan on February 8, 2001 to respond to the Bill of Costs in the Federal District Court lawsuit. Complaint turned 57 in March of this year. He was concerned that he was not able to provide for his wife's needs and illnesses and not be able to pay for her treatments. (T 1054)

In all of his years of working, Complainant has not undergone the kind of events such as he went through with Respondents. Although Respondents have sought to highlight prior litigation in which Complainant was involved, he was actually the prevailing party in virtually every prior case.

The record establishes, moreover, that Complainant has never filed a whistle blower action against any prior employer and there was not need to do so until Crane (T 1054 -1055) For his emotional distress, Complainant seeks **$125,000** as Compensatory Damages.

On the basis of the totality of this record, I find and conclude that the evidence submitted by Complainant supports an award of damages for the emotional distress caused him by the egregious, disparate and discriminatory actions of the Respondents.

Respondents concede that compensatory damages can be awarded for emotional pain and suffering, mental anguish, embarrassment, and humiliation. **DeFord v. Secretary of Labor**, 700 F.2d 281, 283 (6th Cir. 1983). Medical psychiatric experts are not necessary. Awards may be based upon the Complainant's credible testimony about the physical or mental consequences retaliatory action. **Thomas v. Arizona Public Service Co.**, 89-ERA-19 (Sec'y, September 17, 1993). **Thomas** allows a complainant to assign particular dollar amounts to mental and physical anguish which were testified to at the hearing. In **DeFord**, the ALJ found that the Complainant was entitled to compensatory damages in the amount of $50,000.00 for injury to his professional reputation. Medical expenses, damages for emotional pain and suffering, and damages for injuries to reputation are all allowable under the Act. **See DeFord, supra**, at 284.

In exchange for Complainant's attempt to do the right thing by refusing to violate procedures and object to falsification, he was unjustly fired. The toll that this has taken on Complainant has been enormous. Because of Complainant's choice of his attorney in Michigan, and the necessity of holding the hearing in this jurisdiction, Complainant was compelled to make multiple trips to Michigan from either the State of Washington or wherever he happened to be working at the time. During the hearing, the Respondents used the opportunity, not to reiterate their so-called offer of reinstatement, but to serve him with a subpoena to collect several thousands of dollars in costs in the federal district lawsuit. Instead of admitting at the trial what they had already admitted in CX 13, the Respondents have stubbornly refused to concede what they had already admitted to, namely, that Complainant was wrongfully terminated. This required additional efforts on the part of Complainant was wrongfully terminated. This required additional efforts on the

part of Complainant to prove this aspect of the case.

Complainant credibly testified before me, under oath, about his numerous attempts to force the Respondents to do the right thing and obey the law and the implementing regulations. However, these attempts were consistently rebuffed by the Respondents.

Respondents seek to characterize Complainant as "a professional and habitual litigator." They cite what they consider "a notorious legal action" by Complainant against the town of Paradise Valley and other Defendants to support this proposition. In fact, Complainant has prevailed on every dispositive motion in that case against seasoned litigators and will go to trial. If Complainant has been wronged, why should he not litigate the issue? After all, the essence of America is to seek redress for obvious wrongs. Respondents' efforts to inject an unrelated lawsuit into the present litigation is not relevant, and I so find and conclude.

Despite many years in the nuclear industry, Complainant's only litigation under the Energy Reorganization Act is the present lawsuit. It is Respondents, not Complainant, who have unnecessarily prolonged and aggravated the present litigation by refusing to concede that which they have admitted already. Despite clear documentation and testimony that Complainant was wrongfully fired precisely for raising safety issues in the defective work package, and in the condition report in CX 13, Respondents have fought the issue at every opportunity. Also, in the face of unrebutted testimony from Marcus Boggs himself that he never identified any specific job for Complainant, Respondents have forced Complainant to litigate every nuance of that issue as well.

I also find and conclude that the inconsistent statements of Resondents, as well as their outright false statements, have caused Complainant endless worry and grief about finding additional work. At no time was Complainant ever assured that what he was telling the prospective employers would be supported or contradicted by what his former employer, Crane, would be saying.

Unlike the Respondents, Complainant took the directives from the management of American Electric Power seriously and to the letter. "Adherence to procedures" was not an empty slogan, but

a sincerely held belief on the part of a plant that had been shut down by the Nuclear Regulatory Commission for almost three years. It is evident from the statements of John Boesch and Mike Horvath, managers of the Employee Concerns program for AEP, that strict adherence to policy meant just that. It is a measure of how Crane's agents chafed under this strictness when Woody Hall testified that he was not going to be lectured about adherence to procedure by Mike Horvath, got up and walked out of the meeting where he and Crane were being berated by AEP for the failure to follow a policy pertaining to work packages, actions I find to be egregious.

G. RESPONDENT NEVER MADE AN UNCONDITIONAL OFFER OF REINSTATEMENT.

At no time did Marcus Boggs make any specific offer of reinstatement at a specific site at a specific wage. (T 729-730) Boggs testified about specific sites around the country:

> Q. Did you mention any specific sites around the country, where Crane was doing work?
>
> A. I don't recall having mentioned particular sites. (T 760)

On February 11, 1999, Marcus Boggs talked in generalities with Complainant about work with Respondents at a site other than Cook. Although Boggs stated he would get work for Complainant, Complainant never heard from Boggs at anytime after the February 11 conversation. (T 356) There were no specific dates, jobs, sites, or wages proposed. The work at Cook by Respondents ended in April, 1999. At no time after that cessation of work at Cook was Complainant offered any specific job by the Respondents. (T 356)

In place of reinstatement, Complainant demands front pay calculated on the difference between what Crane would have paid him less his compensation as of 2000;

(75,560) - (65,000) = $14,460

With eight years until age 65, this figure is $116,480.

H. COMPLAINANT'S REFUSAL TO WORK FOR RESPONDENT WAS REASONABLE.

The nuclear industry is not like other industries, as Complainant testified. Having one's security badge pulled has a direct effect on one's future employment with other nuclear power plants. If unescorted access is pulled for any reason, the nuclear worker has an obligation to be forthright and honest about the reason why it was pulled. "I have to tell people anything that they ask me, I must tell them. And when they ask me have you ever been fired, have you ever had your badge taken away from you, I have to give them that information. And nobody can make a deal with me that says it never happened because it did." (T 263-264) In other words, any attempt by the Respondents to paper over what happened and "fudge" on the issue of whether Complainant was terminated, why he was terminated, or anything else relating to his Crane employment that was not true could not be made part of a "deal" based upon Complainant's strict obligation to tell the truth about all aspects of what happened on February 10, 1999. (T 264)

Complainant stayed in the area until the first part of March, 1999. After his conversation with Boggs on February 10, Tom Brown called him on Thursday, February 11. Brown said "I have been instructed to tell that you have a job and you are getting paid." He also said "I hope you're not mad at me." (T 266) Because Complainant had been fired, he informed Brown that he had a lawyer and that discussions must take place through the lawyer. At the time of this conversation, Complainant considered himself terminated from the Respondents. His badge was pulled. The reason why it was pulled was because he was terminated. (T 267) Complainant felt that Respondents were trying to get someone else to work the package as if there were nothing wrong with it and demonstrate that Complainant and Pappalardo were unreasonable and justifiably fired. (T 267) However, everyone refused to work it. On February 11, Marcus Boggs called Complainant at 6:00 p.m. Complainant testified:

> And then he said to me, but you weren't fired. And I am sure in not too crazy of a voice I asked him, "what the hell are you talking about, they pulled my badge, they escorted me out of the gate, they jerked my badge, how can you say I'm not fired?" (T 270)

McNeill told Boggs that he would not be coming back to Cook.

Boggs told him that he would give a job to Complainant at some site where Liberty has work. (T 270) However, no site was discussed by Boggs at anytime after he made that statement on February 11th.

Complainant would have worked for American Electric Power at Cook; however, he could not and would not work for the Respondents because of the refusal of Crane/Liberty to address the issues he raised and the fact that he was fired for raising safety issues, a termination that severed the trust between Complainant and the Respondents. (T 271)

The following Saturday, February 13, Larry Ricks called up to tell him it would be "okay" if he came back to work. Complainant asked if Tom Brown were still working for Respondents. Because of that past directive from Tom Brown that he could not go to planning to get defective packages fixed, he could not work with Tom Brown. (T 272-273)

The initial concern of Complainant about working for Liberty/Crane was the absence of any discussion to resolve the matters of defective work packages after February 10th. Before Complainant could return to work, the issue of the work packages had to be resolved. (T 274) Also, Complainant did not want to return to a situation where the same issues could arise. (T 274) Because the work packages were transmitted to Tom Brown from the project coordinator, Complainant could not work under Tom Brown again because of the constant run-ins he had had with him disputing the propriety of work packages. (T 275-276)

When Complainant learned after his termination that coworkers had been threatened with termination if they did not work the sump pump package as written, Complainant knew that the work atmosphere had not changed and that he could not work there. (T 276-277) As Complainant put it:

> Bob Reynolds had described Jason Delashmette "as almost being in tears." He said Tom Brown said he is going to fire me if I don't work the package. I got, he had to make payments to his exwife for his children, you know, $1400, $1500 a month.
>
> He said I can't afford to go to jail. I can't afford to lose a job. Reynolds reinforced to me that Jason was extremely upset about this, and so I believe that Tom Brown had actually said that to Jason. And I

> believe that they tried to get the package worked as written so they would have an excuse to keep me and Paul fired. And under those circumstances, I would not have anything to do with Tom Brown. (T 277)

CX 12 is Jason Delashmette's affidavit stating that after Complainant and Pappalardo were fired, Tom Brown gave him the same work package that Complainant had on February 10th and stated "you are to work this package as written or you will be fired too." In paragraph 8 of CX 12, Delashmette stated that he believed that he would be fired if the package was not worked as written. On Friday, February 12, 1999 a rescoped package was issues to the pump crew eliminating the defects. (CX 12 at ¶ 9)

Boggs conceded the McNeill was tense or angry as a result of the February 10th incident. Contrary to what he offered Pappalardo, he did not offer Complainant thirty (30) days off to cool down. (T 765)

I. EQUITABLE RELIEF.

42 U.S.C. 5851 gives this Administrative Law Judge broad equitable powers to rectify discrimination against a whistleblower. In that light, Complainant requests the following additional relief:

(1) Purge his personnel file of all reference to any termination;

(2) Post notices at all sites where Crane has worked since February 10, 1999 verbiage to the effect that Complainant was wrongfully terminated by Respondents for raising valid safety concerns on February 10, 1999;

(3) Respondents are to post notices that they violated Sec. 211 of the NRJ Reorganization Act with respect to Complainant;

(4) Respondents are to reveal at all plants that they have worked since 1999 that Complainant has been made whole;

(5) Respondents are to make available to all of its employees at all plants copies of the decision of the administrative law judge in the event that Complainant is the prevailing

party; the provisions in 2, 3, 4 and 5 shall be in effect for one (1) year.

(6) Respondent is to provide truthful and accurate information to the P.A.D.S. system of Cook Nuclear Plant as well as other licensees truthfully setting forth the circumstances that occurred on February 10, 1999, along the lines of CX 13;

(7) Respondents are to provide an explanatory letter to be drafted by Complainant setting forth all of the circumstances truthfully and accurately as to the events of February 10, 1999 and their aftermath and such letter shall be placed in Complainant's official personnel file.

(8) Respondents are to be enjoined from any further violations of Sec. 211 of the Energy Reorganization Act and so notify all of their employees at all plants where they have contracts as of the date of the order of the Administrative Law Judge.

At the outset at this point, I would like to highlight certain well-settled principles of law relating to ERA cases. As already noted

Respondents concede that the Act does permit recovery of compensatory damages, which could include special damages such as medical costs, but also general damages such as pain and suffering and emotional distress. **See DeFord v. Secretary of Labor**, 700 F.2d 281 (6th Cir. 1983), **cited in DeFord v. TVA**, 90—ERA—60, Sl. op. at 52—53 (1992). The Administrative Law Judge in **DeFord** noted that with regard to subjective losses such as pain and suffering, the complainant carries the burden of establishing both the existence and the magnitude of these injuries. **DeFord**, Sl. op. at 53 (**citing Busche v. Burkee**, 649 F.2d 509, 519 (7th Cir. 1981). Moreover, there must be a causal connection between the existence of the loss and the employer*s illegal acts. **Id**. Finally, the amount of the award should resemble awards for such injury in similar cases. **Id. (citing McCuiston v. TVA**, 89-ERA-6 (Secretary of Labor Nov. 13, 1991) (objective symptoms accompanying employer blacklisting of employee warranted $10,000 award of compensatory damages); **DeFord v. TVA**, 81-ERA-1 (1984) (award of $10,000 reasonable where complainant suffered chest pain, nausea, insomnia, as a result of embarrassment and humiliation accompanying his

demotion). A common link in the cases in which general damages are awarded is particularly egregious and harmful conduct by the employer, accompanied by proof of objective symptomology by the complainant.

This Administrative Law Judge, in resolving Complainant*s entitlement to compensatory damages and the extent thereof, is guided by certain well-settled principles in the area of compensatory damages law. Compensatory damages are awarded **to make good or replace the loss caused by the wrong or injury and are confined to compensation.** While the purpose of awarding compensatory damages is not to enable the injured or wronged party to make a profit on the transaction, compensatory damages involve the quantum of hurt to a plaintiff resulting from the injury or wrong. The general rule is that a wrongdoer is liable to the person injured in compensatory damages for all of the natural and direct or proximate consequences of his wrongful act or omission but he is not responsible for the remote consequences of his wrongful act or omission. Natural consequences are such as might reasonably have been foreseen, such as occur in an ordinary state of things. Thus, it is often said, if according to the usual experience of mankind the result was to be expected, it is not too remote.

An act or omission is the proximate cause of a loss where there is no intervening, independent, culpable and controlling cause severing the connection between the wrongful act or omission and the claimed loss. Thus, an intermediate cause which, disconnected from the primary act or omission, produces the injury or loss will be regarded as the proximate cause. It is sufficient if it is established that the defendant*s act produced or set in motion other agencies, which in turn produced or contributed to the final result. Moreover, although an act of the plaintiff has intervened between defendant*s wrong and the injury suffered, the defendant is not thereby excused if the intervening act was the result of or was naturally and reasonably induced by his earlier wrong. While the plaintiff is not entitled to recover damages for conditions which are due entirely to a previous disease, the defendant may be liable for damages if his wrongful act aggravated or exacerbated such disease or impairment of health. Thus, the wrongdoer is not exonerated from liability if, by reason of some pre—existing condition, his victim is more susceptible to injury and the plaintiff may recover such damages as proximately result from the activation or aggravation of a dormant disease or condition.

Heart disease was recognized as a pre-existing condition in **Firkol v. A.R. Glen Corp.,** 223 F. Supp. 163 (D.C.N.J. 1963). As between an innocent and a wrongful cause, the law uniformly regards the latter as the proximate and legally responsible cause.

It is also well—settled that damages which are uncertain, contingent or speculative in their nature cannot be recovered as compensatory damages. Where a cause of action is complete and no subsequent action may be maintained, a recovery may be had for prospective and anticipated damages reasonably certain to accrue. Thus, damages are not restricted to the period ending with the institution of the suit and where it is established that there will be future effects sustained by the plaintiff as a result of the wrongful act or injury, damages for such effects may be awarded. The rule of "avoidable consequences," which is supplementary to the rule that a wrongdoer is responsible for the consequences of his misconduct, and is distinguishable from contributory negligence, imposes a duty on the injured person to minimize damages. Thus, no recovery may be had for losses which the injured person might have prevented by reasonable efforts and expenditures.

In general, one injured by another*s wrong is entitled to compensation for all peculiar losses sustained and the burden of such losses falls on the party who occasioned it. Thus, it is generally declared that loss of earnings, wage, salary or other benefit is an element of damages which should be considered, provided that such earnings are not of a speculative or conjectural nature and that they are proved with reasonable certainty. Future earnings, or probable loss of earnings in the future, may be awarded if shown with reasonable certainty and are not speculative in character. Moreover, loss or impairment of earning capacity is a proper element of compensatory damages.

Stated differently, there may also be a recovery for loss of profits shown to be the natural and probable consequences of the act or omission, provided the amount thereof is shown with reasonable or sufficient certainty and provided they are not speculative, contingent, conjectural or remote. Although generally objectionable for the reason that their estimation is conjectural and speculative, anticipated profits dependent on future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability. Moreover, the rule as to certainty of showing has been held by some courts not

to apply to uncertainty as to the amount of the profits which would have been derived, but to uncertainties or speculation as to whether the loss of profits was the result of the wrongful act, and whether any such profits would have been derived at all.

As a general rule, the plaintiff is entitled to all legitimate and reasonable expenses necessarily incurred by him in an honest endeavor to reduce damages flowing from or following the wrongful act as long as the effort to minimize damages was made in good faith. Moreover, the mere fact that an attempt to minimize damages increases or aggravates the loss does not prevent a recovery for the expenses incurred in making the effort, provided the effort was prudently made and the damages flowing from or following the wrongful act as long as the effort to minimize damages was made in good faith.

It is also well—settled that compensatory damages cannot be used to punish the employer and compensatory damages are those necessary to make a wronged party whole and no more. **Hedden v. Conan Inspection Co.**, No. 82-ERA-3, sl. op. of Administrative Law Judge at 7—8 (1982). The Act is silent on an award of exemplary or punitive damages, unlike the employee protection provisions of the Safe Drinking Water Act [42 U.S.C. §300j-9(i) (2) (B) (ii), and of the Toxic Substances Control Act (15 U.S.C. §2622(b) (2) (B)], which contain specific statutory language giving the Department of Labor the authority to award exemplary or punitive damages in appropriate situation. **See, e.g., Davis v. Hill, Inc.**, No. 86-STA-l8, recommended Decision and Order of the Administrative Law Judge at 7 (May 20, 1987), adopted by the Secretary of Labor (July 14, 1987). **See generally Corpus Juris Secundum**, 25 C.J.S., Compensatory Damages, §§ l7-49.

In view of the foregoing, I find and conclude that Complainant is entitled to the following award of back pay and compensatory damages as these damages, except as otherwise noted, resulted directly from his discriminatory discharge.

J. RELIEF ORDERED.

Accordingly, in view of the foregoing, I hereby make the

following **AWARD**:

1. Crane Nuclear, Inc. and Liberty Technologies ("Respondents" herein) shall immediately pay Complainant back pay in the amount of $80,728.00, as computed and determined in the decision.

2. Respondents shall also pay to the Complainant an award of front pay in the amount of $116,480.00 as calculated by the Complainant and as approved herein.

3. Respondents shall also pay immediately to the Complainant the amount of $125,000.00 as compensatory damages for the emotional suffering and distress caused to him by the Respondent's actions herein.

4. Respondents shall also pay to Complainant the following amounts:

(a) $7,984.00 (expenses to attend his deposition and the formal hearings held herein);

(b) $3,462.00 (Complainant's medical bills);

(c) $1,790.00 (Complainant's spouse's medical bills as causally related to and resulting from Respondents' adverse and discriminatory actions herein);

(d) $75,000.00 (representing the reasonable estimated lost profit on the acreage deal Complainant had anticipated).

5. Consistent with this Recommended Decision and Order, Respondents shall pay Complainant interest on these amounts at the rate specified in 26 U.S.C. §6621 (1988). In this regard, **see Van Beck v. Daniel Construction Co.**, 86-ERA-26 (Sec'y Aug. 3, 1993).

6. (a) Counsel for Complainant shall file a Petition for Fees and Costs within thirty (30) days after the filing of the Recommended Decision and Order for all legal services rendered with service on Counsel for Respondents. Such submission shall be on a line item basis and shall separately itemize the time billed for each service rendered and costs incurred. Each such item shall be separately numbered.

(b) Respondents may file objections, if any, to said application for fees and costs within fifteen (15) days of receipt, but all objections to said Counsel's petition shall be on a line item basis using Complainant's numbering system, and any item not objected to in such manner and within such time required shall be deemed acquiesced in by Respondent.

(c) Within fifteen (15) days after receipt of any such objections from Respondent, Counsel for Complainant may file a response thereto. Such submission shall be in the form of a line item response. Any objections not responded to in such manner and within such time will be deemed acquiesced in by Counsel for Complainant.

7. Accordingly, in view of the foregoing Findings of Fact and Conclusions of Law and keeping in mind the egregious, disparate and discriminatory treatment of the Complainant by the Respondents, I find and conclude that the Complainant is also entitled to the following relief and that such relief is reasonable and necessary to remedy the wrongs done to Complainant by Respondents through its agents, representatives and employees:

(a) The Respondents shall immediately expunge and delete from Complainant's official personnel file any and all negative references,

(b) The Respondents shall immediately cease and desist from retaliating against the Complainant and their other employees because of their protected activity.

(c) The Respondent shall also provide a copy of this **ORDER** without comment, via first class mail, to each of their other employees within fourteen (14) days of issuance of this **ORDER**.

(d) Post notices at all sites where Crane has worked since February 10, 1999 verbiage to the effect that Complainant was wrongfully terminated by Respondents for raising valid safety concerns on February 10, 1999;

(e) Respondents are to post notices that they violated Sec. 211 of the NRC Reorganization Act with respect to Complainant;

(f) Respondents are to reveal at all plants that they have

worked since 1999 that Complainant has been made whole;

(g) The provisions in 7(a)-(g) shall be in effect for one (1) year.

8. Respondents are to provide truthful and accurate information to the P.A.D.S. system of Cook Nuclear Plant as well as other licensees truthfully setting forth the circumstances that occurred on February 10, 1999, in accordance with the findings articulated in CX 13;

9. Respondents are to provide an explanatory letter to be drafted by Complainant setting forth all of the circumstances truthfully and accurately as to the events of February 10, 1999 and their aftermath and such letter shall be placed in Complainant's official personnel file.

10. Respondents are enjoined from any further violations of Sec. 211 of the Energy Reorganization Act and shall so notify all of their employees at all plants where they have contracts, as of the date of the order of the Administrative Law Judge, as to the employees' rights under such whistleblower statute.

A
DAVID W. DI NARDI
District Chief Judge

Boston, MA
DWD:jl